(1) Supreme Court, U.S.
FILED

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No. ____

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IN THE

Supreme Court of the United States

October Term, 2000

THE COLEMAN COMPANY, INC.,

Petitioner,

v.

GERALD E. BROWN,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tenth Circuit erred in holding that a provision in the rules of the American Arbitration Association, which authorizes arbitrators to grant relief they deem "just and equitable," empowers arbitrators to reject the express terms of the governing contract in favor of relief that comports with their own personal sense of justice, where that ruling conflicts with the decisions of other courts of appeals holding that the arbitrators cannot fashion "equitable" relief that contradicts the essence and terms of the contract.

PARTIES TO THE PROCEEDINGS BELOW

The following were parties to proceedings in the court of appeals:

The Coleman Company, Inc.
Gerald E. Brown

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Sunbeam Corporation owns 100% of the stock of Laser Acquisition Corporation, which owns 100% of the stock of Coleman Worldwide, which owns 100% of the capital stock of The Coleman Company, Inc.

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THE COLEMAN COMPANY, INC.,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

The Coleman Company, Inc. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit reversing the district court (Pet. App. 1a-10a) is reported at 220 F.3d 1180. The decision of the United States

District Court for the District of Kansas vacating a portion of the arbitration award at issue (Pet. App. 11a-39a) is not reported.

JURISDICTION

The judgment of the Tenth Circuit was entered on July 20, 2000. Pet. App. 1a. A timely petition for rehearing was denied on September 29, 2000. Pet. App. 59a-60a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case is a contract dispute arising from the termination of a senior corporate employee that went to arbitration. At issue is the Tenth Circuit's decision to reinstate a $2.3 million portion of the arbitration award, which the district court had vacated on the ground that the award contradicted the express terms of the employment contract. The Tenth Circuit did not disagree with that interpretation of the contract, but held that the arbitrators' disregard of the contract was justified because the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA"), which applied during the arbitration proceeding in this case, provide that arbitrators may fashion "just and equitable" remedies. The court thus viewed the equitable authority of arbitrators, operating under AAA rules for employment disputes, as broad enough to allow *enforcement* of contract by means of remedies expressly *barred* by the same contract.

This ruling conflicts with prior decisions of the Sixth and Third Circuits, and can be expected to have broad effects, because of the prevalence of arbitrations conducted under the same or comparable rules. It should be reviewed, not only because it conflicts with the decisions of other circuits that are more harmonious with decisions of this Court addressing

judicial review of arbitration awards, but because it will discourage parties from contractually agreeing to arbitrate employment disputes given that the decision grants arbitrators free reign to ignore the express terms of the governing contract.

Arbitration In Today's Commercial World

In ever-increasing numbers, private parties across the nation are memorializing their employment relationships in written agreements. *See* Albert Y. Kim, Comment, *Arbitrating Statutory Rights in the Union Setting*, 65 U. Chi. L. Rev. 225, 225 (1998); William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., *Modifications Necessary for Commercial Arbitration Law to Protect Statutory Rights Against Discrimination in Employment*, 14 Ohio St. J. on Disp. Resol. 29, 29 n.1 (1998). As the use of written employment agreements has mushroomed, so has the use of contractual arbitration clauses: "More and more firms are inserting mandatory arbitration clauses into their employment contracts. . . . Employment disputes promise to be of the biggest growth areas for ADR in the coming years." S. Gale Dick, *ADR at the Crossroads*, 49 Disp. Resol. J. 47, 52 (1994).

These contractual arbitration clauses — which have the salutary effect of keeping private employment disputes out of the courtroom — frequently incorporate the employment dispute rules of the AAA, as the contract at issue here did. Indeed, the AAA estimates in the Introduction to those rules that some *four million* workers are covered by dispute resolution plans administrated by the AAA. *See* AAA, *Introduction to National Rules for the Resolution of Employment Disputes*, 1998 WL 1527109 (A.A.A. Nov. 20, 1998). *See also* Brief of Amicus Curiae American Arbitration Ass'n, in No. 99-1379, 2000 WL 1132767, *Circuit City Stores, Inc. v. Adams*, at 1 ("Millions of non-union U.S. workers

currently are covered by mediation and arbitration agreements that call for administration by the AAA.").[1/] Those rules contain the provision underlying the Tenth Circuit's decision in this case, which authorizes arbitrators in AAA proceedings to grant "'any remedy or relief that the arbitrator deems just and equitable.'" Pet. App. 7a (quoting AAA Employment Disputes Rule 34(d)).

The Employment Contract In This Case

The dispute in this case arose under an employment contract between respondent Gerald E. Brown ("Brown") and his employer, The Coleman Company, Inc. ("Coleman"). After Brown had served as President of Coleman Powermate, Inc. ("Powermate") for a number of years, Brown and Coleman entered the contract, which provided that Brown would receive an annual salary of $225,000 plus fringe benefits and that he would be eligible for bonuses. Aplt. App. at 26-28 ¶ 4.[2/] The contract also provided that Brown could be terminated at any time, even without cause. *Id.* at 29 ¶ 5(f).

The contract set forth two separate provisions outlining the compensation Brown would receive in the event he was

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1/ The AAA may be understating the extent to which its rules govern employment disputes. Even when they are not expressly incorporated into written agreements, AAA rules often are used in arbitrations, and they are also used in employment contracts without the AAA's knowledge. *See* Carol L. Izumi, *et al.*, *Proceedings of 1997 Annual Meeting of the Association of American Law Schools Section on Employment Discrimination Law and Alternative Dispute Resolution*, 1 Employee Rts. & Emp. Pol'y J., 269, 282 (1997) (remarks of Marion Zinman of AAA).

2/ Record references are to the Appendices filed in the Tenth Circuit.

terminated. If Brown was terminated for cause, he would receive a limited list of benefits. *Id.* at 29 ¶ 6(a). The arbitrators rejected Coleman's contention. If Brown was terminated without cause, he would receive a specified list of benefits including two years of salary totaling $450,000, a guaranteed bonus of at least $315,000, and a long list of fringe benefits. *Id.* at 30-33 ¶ 6(c).

Moreover, if Brown was terminated without cause, the contract set forth a formula under which a portion of Brown's stock options would vest immediately. *Id.* at 32-33 ¶ 6(c)(6). The contract expressly required, however, that Brown must exercise his options within 90 days of a "without cause" termination (*id.*, emphasis added):

> Any and all stock options granted to the Executive under the stock option plans of the Corporation . . . will be treated as follows: [vesting formula omitted]. *The vested portion of stock options under this Section 6(c)(6) shall remain exercisable for a period of ninety (90) days after the Date of Termination* (but not beyond its normal expiration date).

The Parties' Dispute

In the Spring of 1997, Jerry Levin ("Levin"), then the CEO of Coleman, directed Brown to assist in the divestiture of a division of Powermate. Aplee. Supp. App. at 68-69, 99-100. During April and May 1997, Brown and other members of management made presentations to several potential purchasers, but those initial efforts were unsuccessful. *Id.* at 70-71, 112-15. In late May 1997, Brown and other members of his team decided to devote their energies to pursuing their own buyout of the division. *Id.* at 72-73, 101-02. Without Levin's permission, Brown proceeded to hire an agent, prepare his own financial projections, and meet with potential

financiers. *Id.* at 74-75, 79, 85-86, 91-92. In the process, Brown disclosed confidential information about Coleman to third parties and used company assets for personal purposes. *Id.* at 85-86, 93-95, 119-20.

On June 13, 1997, Brown and Levin spoke about Brown's buyout strategy (Aplt. App. at 14), and the testimony at the arbitration was in conflict concerning Levin's reaction. Aplee. Supp. App. at 77, 106, 107-08. Brown thereafter submitted a buyout offer. Aplt. App. at 15. Three days later, on July 9, 1997, Levin informed Brown that he was being terminated. *Id.*

On September 19, 1997, within 90 days of the termination, Brown wrote Coleman seeking to exercise all 140,000 of his vested and unvested stock options. Aplee. Supp. App. at 219-20. Coleman objected on the ground that Brown had been properly terminated for cause and could therefore only exercise his vested options. As a result, on October 6, 1997 — still within 90 days of his termination — Brown conducted a transaction involving his vested stock options that yielded a gain of $52,012.80. Aplee. Supp. App. at 221-32.

The Arbitration Award

On September 30, 1998, following hearings on Brown's claims arising from his termination, the arbitrators issued an award in favor of Brown. The arbitrators rejected Coleman's contention that it had cause for terminating Brown. Pet. App. 48a. As a result, based on the benefits available to Brown under the contract's "without cause" compensation provision, the arbitrators awarded Brown $450,000 for two years of salary, $389,844 for bonuses, $52,161 for fringe benefits, and $53,589 for the value of unvested stock options (a value based on an exercise price that was available in the 90-day period following Brown's termination) — for a total of $945,594. *Id.*

at 49a. Because Coleman did not challenge that portion of the award in the courts below, it is not at issue in this petition.

The arbitrators then awarded Brown $2,322,355 in additional stock options damages. *Id.* at 50a-52a. During the arbitration, Brown contended that Coleman had no basis to terminate him for cause and argued that had he not been terminated, he would have profited from a transaction that occurred nine months after he was terminated. *See* Aplee. Supp. App. at 198-201. That transaction involved the sale of the majority of the outstanding shares of Coleman's stock to Sunbeam Corporation — a transaction that caused the trading price of Coleman's stock to increase significantly for a few days before it declined again. *Id.* In response to Brown's argument, Coleman pointed out that regardless of whether there was cause for Brown's termination, the contract allowed Coleman to terminate Brown at any time without cause. And once terminated without cause, Brown had only the 90-day period set forth in paragraph 6(c) in which to exercise his stock options. Because the Sunbeam transaction took place *six months after* the expiration of that 90-day exercise period, Coleman contended that under the express language of the contract's options exercise provision, Brown could not reap the benefits of that transaction. *Id.* at 170-73.

Without addressing paragraph 6(c), however, the arbitrators determined that they would grant an "*extension* of the terms of the options" because they considered that to be an "*equitable* solution." Pet. App. 51a (emphasis added). In reaching this decision, the arbitrators granted Brown a $2.3

million "bonus" that the express terms of the contract did not permit.[3/]

The District Court Decision

On May 12, 1999, the district court vacated the arbitrators' $2.3 million stock options award. Pet. App. 17a-27a. The court rejected Brown's contention that the award was based on a "permissible interpretation of the contract," concluding instead that the parties' contract could not possibly support the "extension" of the 90-day stock options period that the arbitrators granted to Brown. *Id.* at 23a. The court found the arbitrators had been "persuaded by [Brown's] argument that merely enforcing the express terms of the not-for-cause termination provision would produce no punitive measures to dissuade defendant from wrongfully terminating other employees. . . ." *Id.* at 21a.

The district court further determined that the stock options portion of the award could not be justified by the arbitrators' invocation of so-called "equitable powers." The court rejected Brown's argument that the AAA rules governing employment disputes granted broad equitable authority to fashion relief — observing that "[u]nder plaintiff's reasoning, the arbitrators

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3/ Finally, over Coleman's objection as to the arbitrability of Brown's defamation claim, the arbitrators awarded Brown $1 in compensatory damages and $350,000 in punitive damages as a result of statements that Levin made to Powermate management concerning the reasons for Brown's termination. Pet. App. 52a, 58a. The district court upheld the defamation award (*id.* at 27a-37a), Coleman cross-appealed from that determination, and the Tenth Circuit affirmed. *Id.* at 9a-10a. This petition does not challenge that $350,000 defamation award, nor does it challenge the $945,594 award of compensation benefits that the arbitrators awarded Brown in addition to its award of $2.3 million in stock options.

essentially had carte blanche to do anything they desired" — and determined that the arbitrators' award improperly "creat[ed] a right to an extension based on defendant's actions despite a contradictory contractual provision." *Id.* at 24a-25a. Citing cases construing an analogous provision in the AAA rules governing commercial arbitrations, the district court held that the $2.3 million stock options award could not stand because "arbitral authority to extend plaintiff's option exercise period cannot be based on the principle of remedial leeway when the award actually creates a right contrary to the express terms of the contract." *Id.* at 26a.

The Tenth Circuit Decision

On July 20, 2000, the Tenth Circuit reversed the district court's vacation of the $2.3 million stock options award. Pet. App. 8a-9a. In a section of its decision entitled "Equity," the Tenth Circuit held that the arbitrators did not exceed their authority by extending the time in which Brown could exercise his stock options. *Id.* at 7a-8a. The court determined that Rule 34(d), a provision in the AAA employment disputes rules authorizing arbitrators to afford relief that is "just and equitable," enabled the arbitrators to reject the express terms of the contract by granting an "extension" of the specific stock options deadline set forth therein. *Id.*

In reaching this conclusion, the Tenth Circuit seized on a difference between the language of Rule 34(d) and an analogous AAA rule governing commercial disputes (which was relied on by the district court). Specifically, Rule 34(d) provides that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available had the matter been heard in court," while AAA Commercial Arbitration Rule 45(a) . . . allows "any remedy or relief that the arbitrator

deems just and equitable, *and within the scope of the agreement of the parties*." Pet. App. 8a. The Tenth Circuit reasoned that "if the emphasized language in Rule 45(a) limits the equitable powers of the arbitrator in commercial arbitrations to the express language of the contract, . . . the absence of such language in Rule 34(d) would logically mean that the equitable powers of arbitrators operating under the AAA Employment Disputes Rules are not limited to the same extent as under the AAA Commercial Arbitration Rules. . . ." Pet. App. 8a. Thus, based on this distinction, the Tenth Circuit held that Rule 34(d) of the AAA employment disputes rules "permits the crafting of broad equitable relief, and that the panel did not exceed its power by granting the equitable relief of extending the time in which stock options could be exercised." Pet. App. 8a.

REASONS FOR GRANTING THE WRIT

By sanctioning the arbitrators' open disregard of the express provisions of the governing contract, simply because the contract incorporated a set of AAA rules authorizing arbitrators to fashion relief that is "just and equitable," the Tenth Circuit gave the arbitrators (in the words of the district court) "carte blanche to do anything they desired." Pet. App. 24a-25a. In the process of doing so, the Tenth Circuit adopted a rule that directly conflicts with the decisions of the Sixth and Third Circuits, which have held that arbitrators cannot in the name of "equity" ignore or rewrite express contractual provisions. *See, e.g., Wyandot, Inc. v. Local 227, United Food & Commercial Workers Union*, 205 F.3d 922, 929-30 (6th Cir.), *cert. denied*, 121 S. Ct. 62 (2000); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125, 1133-34 (3d Cir. 1972).

Review is appropriate to resolve this circuit split, and is particularly appropriate given the frequency with which the same issue likely will arise again as a result of the Tenth

Circuit's decision. The AAA rules, which according to the Tenth Circuit enable arbitrators to exercise equitable powers that contravene express contractual terms, are in use across the nation. It can therefore be expected that the Tenth Circuit's decision will have a considerable impact on the conduct of many AAA arbitrations nationwide, as well as a significant chilling effect on the use of non-litigation alternatives such as arbitration to resolve employment disputes. If parties cannot control or limit by the express terms of their contracts the remedies that arbitrators may award, as the Tenth Circuit has effectively held, then parties will be far less likely to agree to arbitrate their disputes in the future. Because the Tenth Circuit's decision will have a serious adverse impact on the viability of arbitration as a legitimate alternative to court litigation if the decision remains uncorrected, review by this Court is appropriate to confirm that the exercise by arbitrators of equitable authority must be in accordance with the express terms of the governing contract.

I. The Tenth Circuit's Holding That Arbitrators Possess Broad Equitable Authority to Fashion Remedies That Are Inconsistent With the Express Terms of the Governing Contract Conflicts With Prior Decisions of the Sixth and Third Circuits.

The Tenth Circuit's holding that arbitrators possess broad authority to fashion equitable remedies — even remedies, as in this case, that contradict the express terms of the governing contract — conflicts with decisions of the Sixth and Third Circuits. *See Wyandot v. Local 227, United Food & Commercial Workers Union*, 205 F.3d 922 (6th Cir.), *cert. denied*, 121 S. Ct. 62 (2000); *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125 (3d Cir. 1972).

In *Wyandot*, the Sixth Circuit recently affirmed the vacation of an arbitration award that ordered an employer to reinstate an employee even though the employee did not file her challenge to her discharge within the time provided by the collective bargaining agreement. The Sixth Circuit held that the arbitrator's extension of the grievance reporting period was unsupported by the collective bargaining agreement and amounted to a fashioning of "equitable" relief that was contrary to its terms (205 F.3d at 930):

> [T]he district court appropriately found that the [arbitrator's] Award was based on general considerations of fairness and equity instead of the precise terms of the Agreement. Although Arbitrator Witney avoided using the terms "fairness" and "equity" in his award, the district court concluded that these motivations must underlie the arbitrator's decision to ignore the Agreement's deadlines requirements.

Here, as in *Wyandot*, the arbitrators granted an "extension" of a time period that the contract expressly forbade. The contract provided that stock options "shall remain exercisable," but *only* "for a period of ninety (90) days after the Date of Termination." Aplt. App. at 32-33 ¶ 6(c)(6). Without regard for the contract, the arbitrators identified a transaction that occurred *six months* after the options period expired and decided that Brown should reap the benefit of that transaction, for no reason other than that the arbitrators believed that to be an "equitable solution." This result, which the Tenth Circuit affirmed, cannot be squared with *Wyandot*.

Nor can the Tenth Circuit's decision be reconciled with the Third Circuit's decision in *Swift*, a case on which the district court relied below. Pet. App. 25a-26a. In *Swift*, the parties entered into an agreement under which Botany made warranties

regarding tax liabilities. *See Swift*, 466 F.2d at 1127. The agreement stated that in the event the tax liabilities were more than Botany warranted, then Botany would "pay Swift in cash an amount equal to all losses, liabilities, and expenses incurred or suffered by . . . Swift." *Id.* Some time after the agreement was executed, the Internal Revenue Service ("IRS") asserted that the tax liabilities were in excess of the amounts warranted by Botany. *See id.* While the IRS action was pending, but before the ultimate tax liability was determined, Swift commenced an arbitration proceeding seeking defense costs incurred in the IRS action and a $6 million bond to cover the damages that might potentially be awarded. *See id.* at 1127-28. Following a hearing, the arbitrator awarded the bond requested by Swift.

Botany brought an action to vacate the arbitration award, arguing that the Swift/Botany agreement provided only for the payment of losses actually incurred, and not for security for losses which "may or may not ever accrue." *Id.* at 1133. The district court vacated the award and the Third Circuit affirmed, holding that notwithstanding the broad remedial powers enjoyed by arbitrators, they are not empowered to create a remedy that the contract expressly precludes. *Id.* at 1133-34.

In this case, the Tenth Circuit purported to distinguish *Swift* on the ground that the contract at issue there incorporated AAA Commercial Arbitration Rule 45(a) rather than AAA Employment Arbitration Rule 34(a), emphasizing that the former rule limits the arbitrators' equitable powers to awarding relief that is "within the scope of the agreement of the parties." Pet. App. 8a. Because no such limitation appears in Rule 34(a), however, the Tenth Circuit in this case ruled that the arbitrators were not limited to remedies that are "within the scope of the agreement of the parties." Pet. App. 8a. But the fact remains that the result in this case conflicts with *Swift*: in *Swift*, the

Third Circuit held that equitable principles cannot override the express provisions of a contract. Here, the Tenth Circuit held that they can — at least where the parties have agreed that their disputes will be governed by the AAA employment disputes rules.

Review is warranted to resolve this circuit split, and to determine whether the incorporation into a contract of a *general* AAA rule concerning the authority of arbitrators to fashion "just and equitable" relief permissibly may be construed as trumping *specific* contractual provisions, as the Tenth Circuit in this case held.

II. The Approach of the Sixth and Third Circuits, Not That of the Tenth Circuit in this Case, Best Comports With the Fundamental Principle That an Arbitration Award Must "Draw its Essence" From the Contract.

On the merits, the Tenth Circuit's position is indefensible. This Court has long held — and reaffirmed earlier this Term — that an arbitrator's "award is legitimate only so long as it draws its essence" from the contract authorizing arbitration. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *see also Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 121 S. Ct. 462, 466 (2000) (citation omitted) ("Of course, an arbitrator's award 'must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice'"); *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("[t]he arbitrator may not ignore the plain language of the contract"). The Sixth Circuit's decision in *Wyandot* and the Third Circuit's decision in *Swift* adhere to this venerable principle: both decisions confirm that arbitrators

cannot, in the name of "equity," defy the express terms of the contract.

The Tenth Circuit's decision in this case, however, is another matter entirely. Although paying lip service to the principle that arbitration awards must draw their essence from the contract (Pet. App. 5a), the Tenth Circuit's decision departs from it by holding that the arbitrators in this case acted legitimately by *disregarding* the contract's express terms. Indeed, in summarizing the arbitrators' award, the Tenth Circuit revealed that the award it was confirming does *not* draw its essence from the contract by acknowledging that the arbitrators' decision proceeds not from an interpretation of the 90-day options exercise period set forth in the contract, but from an "extension" of it. *Id.* at 6a.

The express terms of the contract stand directly in the way of this result. Paragraph 6(c)(6) of the contract is clear and unambiguous: it states that Brown's stock options "shall remain exercisable for a period of ninety (90) days after the Date of Termination . . . ." Aplt. App. at 32-33 ¶ 6(c)(6). No provision in the contract authorizes an extension of that 90-day period. Yet, the arbitrators granted a six-month extension anyway, purportedly because they thought that would be an "equitable solution." Pet. App. 51a.

This Court should take a firm stand against this kind of distortion of the arbitration process. No source of law permits arbitrators to defy the plain language of the very contract that grants them jurisdiction to render an award. To the contrary, "an arbitrator is confined to interpretation and application of the [contract]; he does not sit to dispense his own brand of industrial justice." *Steelworkers*, 363 U.S. at 597; *see also Misco*, 484 U.S. at 38 (an arbitrator "may not ignore the plain language of the contract").

The Tenth Circuit purported to justify its departure from this settled rule based on the fact that this arbitration was conducted under the AAA's employment disputes rules, which authorize the arbitrator to grant "'any remedy or relief that the arbitrator deems just and equitable.'" Pet. App. 7a (quoting Rule 34(d)). At the threshold, it should be noted that *nowhere* is any AAA rule cited in the arbitrators' award. Thus, under the Tenth Circuit's view, arbitrators need not even mention Rule 34(d) when they decide they want to rewrite the parties' contract. In reviewing the resulting arbitration awards, courts will simply invoke Rule 34(d) *sua sponte* and use it to excuse the arbitrators' blatant disregard of the contract. Under this approach to "judicial review" of arbitrator awards, which the Tenth Circuit adopted, it is difficult to understand what is left of that review.

Further, even more fundamentally, it cannot be the law that a rule entrusting general equitable powers to arbitrators may be used to ignore or rewrite express contractual terms. It is one thing for arbitrators to invoke the equitable powers provided in governing procedural rules to fashion remedies where the contract is silent as to remedies, or where the award of equitable relief is not inconsistent with the contract's terms. But it is another thing entirely to hold that the arbitrators' power to fashion "just and equitable" relief authorizes them to defy the express provisions of the contract.

That is where other circuits like the Sixth Circuit in *Wyandot* and the Third Circuit in *Swift* — in accordance with the longstanding precedents of this Court — have drawn the line. *See also Yasuda Fire & Marine Ins. Co. of Europe v. Continental Cas. Co.*, 37 F.3d 345, 351 (7th Cir. 1994) (upholding arbitration award but emphasizing that "we do agree with the general proposition that the arbitration panel would exceed its authority if it provided an award which the

agreement explicitly excluded as an option"). In agreeing to have their employment disputes resolved by arbitration, parties understand that the courts will not later intervene to correct mere errors in an arbitration award. But the parties also understand that the judiciary, in accordance with this Court's precedents, *will* step in if the award of the arbitrators fails to draw its essence from the contract. This is one of the only protections that contracting parties have from overreaching and abusive arbitration awards. Yet, in an indefensible departure from the law governing judicial review of arbitration awards, the Tenth Circuit in this case held that arbitrators may avoid even this basic limitation on their jurisdiction by the simple expedient of invoking their "equitable" powers in fashioning an award.

Because the Tenth Circuit's opinion is published, the approach it adopted is now well-known and available in every arbitration involving any of the literally millions of employment agreements across the nation that have adopted the AAA's rules. In light of the Tenth Circuit's expansive construction of AAA Rule 34(d), arbitrators will have supporting legal authority to lend legitimacy to their disregard of the express terms of the governing contract. Indeed, given the expansiveness of the "equitable" powers conferred by the Tenth Circuit's decision, arbitrators will be free to go so far as to announce openly exactly what they are doing (ignoring the contract), when they wish to take action that the express terms of the contract do not permit.

The ultimate effects of the Tenth Circuit's approach are not hard to predict. This Court currently has before it in *Circuit City Stores v. Adams* (No. 99-1379) a series of amicus briefs, extolling the virtues of mandatory arbitration in the employment context. But those arguments implicitly presume that arbitration will not be lawless because it is governed by the

principle that the arbitrators' award must draw its essence from the contract. The proponents of arbitration will take a very different view if it becomes established law that arbitrators have what the district court called "carte blanche to do anything they desire[]." Pet. App. 24a-25a. Because few rational parties would cede away their contract rights to the whims of the arbitrators in this way, the Tenth Circuit's decision will have a significant adverse impact on the viability of arbitration as an alternative to court litigation. Especially given the wide-ranging and chilling influence that this decision will have, review by this Court is appropriate to confirm that an arbitration award — even one governed by the AAA's rules — that fails to draw its essence from the contract cannot stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 22, 2000

APPENDICES

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

GERALD E. BROWN,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 99-3181
	)	
THE COLEMAN COMPANY, INC., a Delaware corporation,	)	
	)	
Defendant-Appellee.	)	

GERALD E. BROWN, an individual,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 99-3203
	)	
COLEMAN COMPANY, INC., a Delaware corporation,	)	
	)	
Defendant-Appellant.	)	

Appeal and Cross-Appeal from the United States District Court for the District of Kansas
(D.C. No. CV-97-1539-MLB

Lazar Pol Raynal, McDermott, Will & Emery, Chicago, Illinois (Michael A. Pope and Joseph G. Fisher, McDermott, Will & Emery, Chicago, Illinois; Larry B. Spikes, Martin, Pringle, Oliver, Wallace & Swartz, Wichita, Kansas, with him on the brief), for Plaintiff-Appellant-Cross-Appellee.

Daniel Lynch, Jenner & Block, Chicago, Illinois, (Jerold S. Solovy, Jeffrey T. Shaw and Jennifer L. McManus, Jenner & Block, Chicago, Illinois; Darrell L. Warta, Foulston & Siefkin, Wichita, Kansas, with him on the brief) for Defendant-Appellee-Cross-Appellant.

Before **BALDOCK, MAGILL,*** and **LUCERO**, Circuit Judges.

MAGILL, Circuit Judge.

A three-member arbitration panel awarded Gerald E. Brown a total of $3,617,930 for breach of employment contract, wrongful termination, and defamation by the Coleman Company (Coleman). Brown brought an action under the Federal Arbitration Act to confirm the award. The district court vacated the $2,322,335 portion of the award that was based on the value of certain stock options and confirmed the rest of the award, including $350,001 for defamation. Brown appeals the vacatur of the $2,322,335 award for the stock

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* Honorable Frank Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

options, and Coleman appeals the confirmation of the $350,001 award for defamation. We REVERSE in part and AFFIRM in part.

I.

Brown, a twenty-three year employee and the president of the Powermate division of Coleman since 1989, was terminated from his position by the CEO of Coleman, Jerry Levin, on June 19, 1997. Shortly thereafter, Levin met with Powermate employees and claimed that Brown had been fired for misuse of company funds and assets. Coleman later notified Brown that he was being terminated under the termination for cause clause of his employment contract. Under the contract, Brown would be entitled to only vested stock options if he were terminated for cause, however he would be entitled to all stock options, both vested and unvested, if he were terminated without cause.

Originally, Brown filed a complaint in Illinois state court seeking specific performance of the employment contract. Coleman had the case removed to the United States District Court for the Northern District of Illinois. The District Court for the Northern District of Illinois partially granted specific performance, ordered arbitration of the claims at issue in this appeal, and, pursuant to the contract, transferred the case to the United States District Court for the District of Kansas.

The arbitration was heard by a three-member panel operating under the National Rules for the Resolution of Employment Disputes of the American Arbitration Association (AAA). Brown challenged whether his termination was for cause, and further claimed the explanation presented by Levin to the Powermate employees constituted defamation. The

panel found for Brown on all of his claims and made three separate awards to him. First, the panel awarded $945,594 for breach of employment contract and wrongful termination, including $53,589 for all of Brown's outstanding stock options as valued on October 7, 1997. Coleman does not challenge this award. Second, the panel awarded an additional $2,322,335 (stock options award) based on the increased value of Brown's stock options by April 1998. Powermate was bought by Sunbeam, Inc. in early 1998 and, under the contract, all of Brown's stock options would have automatically vested at that time. Apparently, the value of Coleman stock increased exponentially in a six-month span, as the total value of the stock options would have been $2,375,924 if the options were exercised in April or May 1998. The arbitration panel justified this award on two separate grounds: 1) A contract interpretation, finding that Brown was never properly terminated under the contract, and thus, should have still been able to exercise his stock options in April 1998; and 2) a decision in equity requiring the award lest Coleman be unjustly enriched. The theory of the equity decision being, that Coleman terminated Brown because it knew the Powermate division would soon be sold and Brown would then be entitled to stock options that would cost the corporation over $2,000,000. The third, and final award, was $350,001 for Brown's defamation claim.

The District Court for the District of Kansas confirmed the first award of $945,594, vacated the second award of $2,322,335 for the additional value of the stock options, and confirmed the third award of $350,001 for the defamation.

Brown appeals the vacatur of the stock options award and Coleman appeals the confirmation of the defamation award.[1/]

II.

The district court vacated the stock options award based on two exceptions to the extreme deference normally given to arbitrators' decisions. First, the district court rejected the panel's interpretation of the contract as not drawing its essence from the contract as required by United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). Second, the district court held the panel could not exercise any powers of equity and thus the arbitrators exceeded their powers in violation of the Federal Arbitration Act, specifically 9 U.S.C. § 10(a)(4). While this Court reviews the district court's decision de novo, we must give extreme deference to the determination of the arbitration panel for "the standard of review of arbitral awards is among the narrowest known to law." ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995) (quotation omitted). "By agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31, 111 S.Ct. 1647, 114 L.Ed. 26 (1991).

A. Interpretation of the Contract

Under Enterprise Wheel and its progeny, this Court must determine "whether [the arbitrator] was even arguably construing or applying the Agreement thus drawing the essence

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1/ Coleman does not appeal the first award of $945,594.

of his award from the Agreement." International Bhd. of Elec. Workers, Local Union No.611, AFL-CIO v. Public Serv. Co. of NM, 980 F.2d 616, 618 (10th Cir.1992). The arbitration panel found Coleman had failed to properly terminate Brown for cause under paragraph 5(c) of the contract. Further, Coleman did not meet the requirements for terminating Brown without cause under paragraph 5(f) because proper notice was never given as required by paragraph 5(g). The panel "inferred from the evidence that one of Coleman's considerations in choosing a 'for cause' termination was to avoid paying Mr. Brown for what he was entitled to receive under the contract if his termination was without cause." Thus, Coleman's actions were "tantamount to no termination at all." The panel further stated that four cases supported the extension of any stock options until April or May 1998 when the options would have been valued at $2,375,924.

The district court found that the panel erred, and that there was no support for the position that Brown was never actually terminated, nor any support to extend the time period during which the stock options could be exercised. However, this Court has held "a court may not overturn an arbitrator's decision even when error has been committed." NCR Corp. v. District Lodge No. 70, 906 F.2d 1499, 1504 (citing United Paperworkers Int'l Union, AFL-CIO v. Misco, 484 U.S. 29, 37-40, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987)). Brown and Coleman contracted for the arbitrator's construction of the contract not a judge's construction. See Enterprise Wheel, 363 U.S. at 599, 80 S.Ct. 1358 (stating "the courts have no business overruling [the arbitrator] because their interpretation of the contract is different from his.").

The arbitration panel interpreted the contract in making this award. Perhaps the panel did not interpret the contract in the manner in which the district court would have, particularly as to the termination without cause clause and its relationship to the notice of termination requirement. However, how the district court would have interpreted the contract is not at issue. Because the $2,322,335 stock options award was based on the contract, the panel's decision must be confirmed and the district court reversed.

B. Equity

Further, this Court now determines the panel's decision also was justified under its powers to provide an equitable remedy. It is beyond question that an arbitrator may have broad equity powers if the rules under which he is operating provide for equitable relief. See Gilmer, 500 U.S. at 32, 111 S.Ct. 1647. The question is whether those powers of equity were available to the arbitration panel in this case.

This arbitration was conducted pursuant to the AAA Employment Dispute Rules, which provide "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court." AAA Employment Disputes Rule 34(d).[2/] Because no reported Federal case has examined Rule 34(d), or its predecessor Rule 32(c), the district court held Rule 34(d) did

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2/ Prior to January 1999, AAA Employment Disputes Rule 34(d) was numbered Rule 32(c). As the two versions contain identical language, the Court refers to the applicable Employment Disputes as Rule 34(d) throughout this opinion.

not permit the panel to exercise powers of equity based on other courts' decisions limiting current AAA Commercial Arbitration Rule 45(a),[3/] which allows "any remedy or relief that the arbitrator deems just and equitable, *and within the scope of the agreement of the parties*." AAA Commercial Arbitration Rule 45(a) (emphasis added). If the emphasized language in Rule 45(a) limits the equitable powers of the arbitrator in commercial arbitrations to the express language of the contract, as suggested by Swift Indus., Inc. v. Botany Ind., Inc., 466 F.2d 1125, 1132-33 (3d Cir. 1972), the absence of such language in Rule 34(d) would logically mean that the equitable powers of arbitrators operating under the AAA Employment Disputes Rules are not limited to the same extent as under the AAA Commercial Arbitration Rules. Coleman drafted Brown's employment contract, and thus, chose the rules of arbitration that would be used to settle disputes. Coleman was not bound to choose rules that provided such broad power to the arbitrator to grant equitable relief, however, having chosen the rules of arbitration, Coleman is now bound by those rules. We now hold that Rule 34(d) of the AAA Employment Disputes Rules permits the crafting of broad equitable relief, and that the panel did not exceed its power by granting the equitable relief of extending the time in which stock options could be exercised.

We reverse the district court and reinstate the arbitration award of $2,322,335 for the additional value the stock options

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3/ Prior to January 1999, AAA Commercial Arbitration Rule 45(a) was numbered Rule 43. As the two versions contain identical language, the Court refers to the applicable Commercial Arbitration Rule as 45(a) throughout this opinion.

would have held in May 1998 based on both the panel's interpretation of the contract and on its exercise of powers of equity in crafting relief.

III.

The district court found Brown's defamation claim fell within the scope of the arbitration clause in Brown's employment contract. The question of whether a claim is subject to arbitration is for the courts, and the decision of the arbitrator is given no weight. See ARW Exploration, 45 F.3d at 1461. The arbitration clause in this contract states "all disputes or controversies arising under or in connection with this Agreement . . . will be settled exclusively by arbitration." When a contract contains a broad arbitration clause, matters that touch the underlying contract should be arbitrated. See Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 624 n. 14, 105 S.Ct. 3346, 87 L.Ed 2d 444 (1985); Gateway Coal Co. v. United Mine Workers, 414 U.S. 368, 376, 94 S.Ct. 629, 38 L.Ed2d 583 (1974). The arbitration clause before us today is the very definition of a broad arbitration clause as it covers not only those issues arising under the employment contract, but even those issues with any connection to the contract. Because arbitration is only required where the parties have contracted for it, "the exact content of the allegedly defamatory statement must be closely examined to see whether it extends to matters beyond the parties' contractual relationship." Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 28 (2d Cir.1995). When a contract's arbitration clause is broad, the strong presumption is in favor of issues being subject to arbitration. See id. Levin told the Powermate employees that Brown had been terminated for failure to uphold his contract with Coleman and claimed

Brown had misused corporate assets. Levin's defamatory explanation dealt with the termination of Brown's employment and his supposed violation of his employment contract. The defamation claim touches the contract because the contract and Brown's supposed violation of it are the very things discussed in the defamatory statement. The district court's finding that the arbitration panel correctly asserted jurisdiction over the defamation claim is affirmed.

IV.

For the foregoing reasons, we reverse the district court's vacatur of the $2,322,335 stock options award, affirm the district court's confirmation of the $350,001 defamation award, and reinstate the panel's award in its entirety.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

GERALD L. BROWN,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	No. 97-1539-MLB
THE COLEMAN	)	
COMPANY, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This is an action by plaintiff for an order confirming an arbitration award pursuant to the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16. The matter is currently before the court on defendant's motion to vacate (Doc. 25) portions of the award and plaintiff's motion for enforcement of the award (Doc. 35).[1/] The court has jurisdiction of this matter pursuant to 28 U.S.C. § 1332 and 9 U.S.C. § 9.

1/ Plaintiff's motion also seeks a supersedeas bond and post-award interest. In an April 19, 1999 hearing, the court denied plaintiff's application for a supersedeas bond. Pursuant to Fed. R. Civ. P. 62(d), if defendant appeals from the orders herein, and seeks to stay execution of the judgment, it must post a supersedeas bond.

I. PROCEDURAL HISTORY

Judicial proceedings between the parties began in late 1997 when plaintiff filed a complaint in Illinois state court seeking specific performance of an employment contract (the "contract") entered into by the parties. Defendant removed the action to the United States District Court for the Northern District of Illinois and thereafter filed a motion to compel arbitration and to dismiss or stay the litigation. The court granted specific performance of plaintiff's right to compensation under the contract through the date of his termination, denied defendant's motion to compel arbitration, and transferred the remaining claims to this court pursuant to 28 U.S.C. § 1404 because Wichita, Kansas is the forum selected for arbitration under the contract. Apparently, following transfer of the case, the parties voluntarily submitted to arbitration. The arbitration resulted in an opinion and award in favor of plaintiff, which he now seeks to confirm by order of this court.

II. FACTUAL BACKGROUND

Prior to his termination, plaintiff had been an employee of defendant and its subsidiaries for twenty-three years. In 1989, he became the president of Coleman Powermate, Inc. (Powermate), a division of defendant that manufactures portable electrical generating equipment and air compressors. A contract executed in January 1996 governed the terms and conditions of plaintiff's employment.

In the spring of 1997, plaintiff was directed by Jerry Levin (Levin), defendant's CEO, to aid in the divestiture of Powermate's compressor division. Attempts to locate a purchaser for the division were unsuccessful, and in May 1997,

plaintiff discussed the possibility of a management-led buyout (MBO) of the division by himself and others with an employee of defendant's majority shareholder who was also assisting in the efforts to sell the division. Plaintiff pursued the potential MBO, and on June 16, 1997, submitted an offer to defendant for the compressor division.

Three days later, Levin fired plaintiff. In a meeting with Powermate employees, Levin explained that plaintiff was terminated for "misuse of company assets and other illegal activity; or misuse of company funds." (Doc. 27, Ex. A at 9). After informing plaintiff of his termination, an internal investigation was conducted by defendant to determine whether the termination would be for cause or not-for-case under the contract. Following the investigation, plaintiff was notified his termination was "for cause" under ¶ 5(c) of the contract for three reasons: 1) disclosing confidential information; 2) missing company assets; and 3) engaging in a material conflict of interest.

Plaintiff challenged defendant's for cause determination and claimed he was entitled to numerous compensation benefits under the terms of the contract's not-for-cause termination provisions. In addition, he alleged Levin defamed him in his meeting with Powermate employees. A three member arbitration panel conducted a five day hearing on plaintiff's claims and issued a thirteen page opinion and award. In summary, the panel concluded:

> Mr. Brown was summoned to New York on June 19, 1997, and summarily terminated. Mr. Levin would not allow Mr. Brown to explain. There was no just cause for the termination for the reasons of conflict of interest,

breach of confidentiality or breach of fiduciary obligation. Mr. Levin was totally unjustified in terminating Mr. Brown.

(Doc. 27, Ex. A at 4). Based on its findings, the panel concluded there was no basis for defendant to fire plaintiff "for cause" under ¶ 5(c) of the contract; therefore, plaintiff was entitled to compensation and benefits based on the not-for-cause termination provision of the contract, ¶6(c). Additionally, the panel found that Levin had defamed plaintiff in the Powermate employee meeting.

The arbitration panel ordered defendant to pay plaintiff $3,267,929 for his claims. (Doc. 27, Ex. A at 1). The award consists of three distinct components. First, plaintiff was awarded $945,594 under ¶ 6(c) for his base salary, bonus, insurance and other benefits listed in the contract. (Doc. 27, Ex. A at 5). Included in this figure is $53,589 for stock options that were unvested prior to his termination.

At the time of his termination, plaintiff had approximately 140,000 stock options: 12,000 vested stock options and 128,000 unvested stock options. (Doc. 33, Ex. 2 at 174-75). Following his termination, plaintiff attempted to exercise all of his options, but defendant only permitted him to exercise the 12,000 vested options. (Doc. 27, Ex. C7 and C8). Defendant claimed plaintiff was not entitled to the unvested stock options because he was fired for cause. In a termination for cause, pursuant to ¶ 6(a) of the contract, plaintiff was only entitled to any stock options that were vested at the time of his termination.

However, under ¶ 6(c)(6), all unvested shares vest immediately in a not-for-cause termination. Because the panel

determined that plaintiff was terminated without cause, it concluded he was entitled to all 140,000 of his stock options, not just the 12,000 that were vested prior to the date of his termination. The $53,589 represents the profit plaintiff would have realized had defendant permitted him to exercise the 128,000 unvested options when he initially attempted to do so following his termination.[2] (Doc. 33, Ex. 2 at 174-75). Defendant does not challenge the $945,594 portion of the arbitral award, including the $53,589 awarded for the profit on the 128,000 options. (Doc. 26 at 1).

Second, the panel awarded plaintiff an additional $2,322,335 in damages for his stock options. (Doc. 27, Ex. A at 7). The award is based on the profit, in excess of the earlier $53,589 profit, plaintiff would have made on his stock options had he been employed by defendant in April or May of 1998 when a majority of outstanding shares of the Coleman Company were sold to Sunbeam, Inc.[3] (Doc. 27, Ex. A at 6-7).

2/ From the record, plaintiff apparently informed defendant in a letter dated September 19, 1997 that he wished to exercise all 140,000 options. (Doc. 27, Ex. C7.) On October 6, 1997, the 88th day following plaintiff's termination, defendant performed plaintiff's requested transaction but only on the 12,000 shares that were vested prior to plaintiff's termination. The $53,589 profit on the remaining 128,000 shares is based on the market value of Coleman stock on October 6, 1997.

3/ If plaintiff would not have been fired, his shares would have vested when Sunbeam purchased the majority of Coleman's outstanding shares under a provision in the contract vesting all unvested shares in a change of control situation. (Doc. 27, Ex. B at 11, ¶ 8(c)). At the time of Sunbeam's purchase, the market price of Coleman stock was apparently dramatically higher than it was in the

Under ¶ 6(c)(6) of the contract:

> The vested portion of stock options under this Section 6(c)(6) shall remain exercisable for a period of ninety (90) days after the Date of Termination (but not beyond its normal expiration date).

Despite this provision, the panel extended the exercise period to cover the date of Sunbeam's purchase and awarded plaintiff an additional $2,322,355 profit he would have made if he could have exercised his options at the time of the Sunbeam purchase, rather than during the contractually required ninety-day period in which he would have made the $53,589.4/ The panel concluded plaintiff was entitled to the additional damages because 1) defendant would be "unjustly enriched" otherwise and 2) plaintiff would have been entitled to exercise the options if he would have been employed at the time of the Sunbeam purchase. (Doc. 27, Ex. A at 7).

Finally, plaintiff was awarded $1 in actual damages and $350,000 in punitive damages for his defamation claim. In making the award, the panel noted defendant's objection to arbitration of the defamation claim but concluded it had authority under the arbitration clause to resolve the issue.

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ninety-day period following plaintiff's termination.

4/ This was the result advocated by plaintiff's attorney during the arbitration hearing. "[Plaintiff] was fired improperly and therefore you should treat him as if he were still an employee seven months later when Sunbeam purchased the company and this is his lost damages that he suffered." (Plaintiff's opening statement to the panel, Doc. 33, Ex. 1 at 25).

Defendant seeks vacatur of the $2,322,335 portion of the arbitral award for plaintiff's stock options and the portion of the award related to the defamation claim. Defendant attacks the stock option award on the ground that extending the option exercise period directly contravenes an express provision requiring exercise of the options within ninety days of termination. With respect to the defamation claim, defendant argues the contract's arbitration clause does not extend to defamation claims despite the panel's conclusion otherwise, and therefore, the panel had no authority to make that portion of the award.

III. THE STOCK OPTION AWARD

Defendant's attack on the stock option award essentially challenges the propriety of the panel's decision. Generally, courts can do little in situations where arbitrators misinterpret contracts, misapply the law, or err in their understanding of the facts.

A. STANDARD OF REVIEW

The standard of review of an arbitral award has been characterized by the Tenth Circuit as "the narrowest known to the law." Litvak Packing Co. v. United Food & Commercial Workers, Local Union No. 7, 886 F.2d 275, 276 (10th Cir. 1989). "Errors in either the arbitrator's factual findings or his interpretation of the law . . . do not justify review or reversal on the merits of the controversy." Denver & Rio Grande W. R.R. Co. v. Union Pacific R.R. Co., 119 F.3d 847, 849 (10th Cir. 1997).

Once an arbitration award is entered, the finality that courts should afford the arbitration process weighs heavily

> in favor of the award, and courts must exercise great caution when asked to set aside an award. Because a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings, it is well settled that judicial review of an arbitration award is very narrowly limited.

ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1463 (10th Cir. 1995) (quoting Foster v. Turley, 808 F.2d 38, 42 (10th Cir. 1986)).

An arbitration award may only be vacated for reasons delineated in the FAA, 9 U.S.C. § 10, or if the award violates one of the limited number of judicially created exceptions. See Denver & Rio Grande, 119 F.3d at 849. Under 9 U.S.C. § 10(a), an order vacating an arbitration award may be made:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where arbitrators were guilty of misconduct in refusing to postpone a hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not

expired the court may, in its discretion, direct a rehearing by the arbitrators.

The Act also permits a modification or correction of an "evident material" miscalculation or mistake in the arbitration award. See 9 U.S.C. § 11(a). The judicially created exceptions supporting vacatur include situations where the arbitration award violates public policy, is based on a manifest disregard of the law, or if the arbitrator did not conduct a fundamentally fair hearing. See Denver & Rio Grande, 119 F.3d at 849.

The review to be applied in this matter is "whether the arbitrator's award 'draws its essence' from the contract of the parties." See Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631, 634-35 (10th Cir. 1988) (applying the essence of the contract test to an arbitral award made under an employment contract).[5/] Under this review, "as long as the arbitrator is even arguably construing or applying the contact and acting within the scope of his authority, that a court is convinced he committed series error does not suffice to overturn his decision." International Bhd. of Electrical Workers, Local Union No. 611, AFL-CIO v. Public Serv. Co. of N.M., 980 F.2d 616, 618 (10th Cir. 1992) (quoting United Paperworkers Int'l v. Misco, Inc., 484 U.S. 29, 38, 108 S. Ct. 364, 371, 98 L. Ed. 2d 286 (1987)). An arbitrator's decision may only be vacated if "it can be said with positive assurance that the

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5/ The Supreme Court initially discussed the essence of the contact review in United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960), which involved a dispute governed by the labor acts. The analysis applies equally to review of an arbitral award pursuant to the FAA, 9 U.S.C. § 10. See Jenkins, 847 F.2d at 634.

contract is not susceptible to the arbitrator's interpretation." Id. (quoting United Food & Commercial Workers, Local Union No. 7R v. Safeway, 889 F.2d 940, 947 (10th Cir. 1989)).

Judge Posner explained in Ethyl Corp. v. United Steelworkers of Am., AFL-CIO-CLC, 768 F.2d 180, 184-85 (7th Cir. 1985), the pitfalls encountered by district court judges when applying the essence of the contract review.

> Whenever an arbitration misreads a contract, it is possible to say that his award fails to draw its essence from the contract; that the ground of the award is not the contract but the arbitrator's misreading. But so long as the award is based on the arbitrator's interpretation -- unsound though it may be -- of the contract, it draws its essence from the contract . . . . It is only when the arbitrator must have based his award on some body of thought, or feeling, or policy, or law that is outside the contract (and not incorporated in it by reference, either, see Jones Dairy Farm v. Local No. P-1236, United Food Workers, 760 F.2d 173, 176 (7th Cir. 1985)) that the award can be said not to "draw its essence from the collective bargaining agreement," as in our recent decisions in Young Radiator Co. v. International Union, U.A.W., 734 F.2d 321, 325 (7th Cir. 1984), and Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1164-65 (7th Cir. 1984). This qualification is made clear, by the way, in the preceding sentence of the Enterprise Wheel & Car opinion: "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." 363 U.S. at 597, 80 S. Ct at 1361.

As Judge Posner also recognized, it is often unclear "whether the arbitrator has interpreted the contract or relied on some private notion of equity;" however, if there is reasonable doubt as to whether the arbitrator's decision is based on an interpretation of the contract, the result must be in favor of enforcing the award." Id. at 185; see also International Bhd., 980 F.2d at 619 (discussing whether the arbitrator's decision was "so unfounded in reason and fact, so unconnected with the wording and purpose of the . . . agreement as to manifest an infidelity to the obligation of the arbitrator . . . that the essence of the award has not been drawn from the Agreement or that it violates the express language of the Agreement") (quotation and citations omitted)).

B. THE PANEL'S DECISION

The arbitration panel concluded that an extension of the option exercise period was warranted based on the circumstances of plaintiff's termination and would be an "equitable solution." (Doc. 27, Ex. A at 6-7). The overriding theme of the opinion was that defendant had no reason to terminate plaintiff but "invented" reasons for purposes of avoiding severance benefits plaintiff was entitled to in a termination without cause. However, the panel was persuaded by plaintiff's argument that merely enforcing the express terms of the not-for-cause termination provision would produce no punitive measures to dissuade defendant from wrongfully terminating other employees and would permit defendant to reap a windfall.6/ (Doc. 27, Ex. A at 6 (adopting plaintiff's post

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6/ The panel's opinion states that it "agrees with the analysis of Coleman in its post hearing brief." (Doc. 27, Ex. A at 6 (emphasis

hearing brief argument)). The windfall referred to is the payment defendant would have had to make to plaintiff, had plaintiff been employed at the time of the Sunbeam purchase, for profits resulting from his exercise of the options that would have vested in the change of control. The panel concluded, "[t]hat would not be an equitable result and would be a result we cannot allow to occur here." (Doc. 27, Ex. A at 6). Therefore, the panel awarded $2,322,335, the profits plaintiff would have received had he not been fired.

Defendant does not attack the panel's determination that plaintiff was fired without cause, see doc. 26 at 12, nor does it contend the arbitrators incorrectly determined that plaintiff's

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added)). The panel mistakenly referred to "Coleman's" post hearing brief, but it is apparent the reference was to plaintiff's brief. The following is the entirety of plaintiff's argument referred to by the panel.

> Having failed to establish a legitimate "for cause" termination, Coleman contends that it can simply fall back on the Contract's not-for-cause termination provision and pay Brown accordingly. In essence, Coleman seeks to place itself in a win-win situation. In the best scenario for Coleman, the employee fails to fight or loses his claim of an improper termination and Coleman reaps the monetary benefits applicable to such a termination. If the employee does fight and prevails, Coleman still wins. In that scenario, Coleman simply falls back on the not-for-cause termination provision and ends up paying the employee only what it should have paid in the first place. No disincentive would exist for Coleman to avoid wrongfully terminating employees. Equity demands a different result, however.

(Doc. 27, Ex. K at 21-22).

unvested stock options vested upon his termination without cause under ¶ 6(c)(6). (Doc. 26 at 13). Instead, defendant argues the award must be vacated because the panel's decision is in direct contravention of ¶ 6(c)(6) which required plaintiff to exercise the options sometime in early October 1997, not in April 1998 when the Sunbeam purchase occurred.

Plaintiff disagrees with defendant's assertion that the panel ignored the contract's terms and contends the award is based on an interpretation of the contract. As plaintiff explains it, the panel interpreted ¶ 6, "Compensation Upon Termination," to only cover a "proper" termination. (Doc. 30 at 10-11). Because plaintiff was fired "without just cause" to deprive him of his contractual benefits, or in plaintiff's characterization, improperly, extension of the exercise period was a permissible interpretation of the contract. (Doc. 30 at 11 n.5 (attempting to distinguish that the panel found that plaintiff was wrongfully terminated without just cause, not without cause)). Alternatively, plaintiff relies on the panel's finding that "the wrongful termination was tantamount to no termination at all," and plaintiff was entitled to the award for that reason. (Doc. 30 at 11).

Despite plaintiff's arguments, after an exhaustive review of the contract, the court can state with positive assurance that the contract is not susceptible, under any interpretation, to a construction that permits an extension of the ninety-day period. The contract clearly provides that plaintiff could be terminated without cause at any time, doc. 27, ex. B at 5, ¶ 5(f), and the panel concluded that plaintiff had in fact been terminated without cause . Paragraph 6(c) governs plaintiff's rights in the event of a termination without cause, and under ¶ 6(c)(6), plaintiff had to exercise his options within ninety days of his

termination, which expired sometime in October 1997. This is conceded in the panel's opinion, yet the award is based on Coleman's stock price in April 1998 rather than the ninety-day period following the termination.7/ Furthermore, this is not a result subject to characterization as a misinterpretation because the arbitrators were not even arguably construing or applying the contract and made no attempt to disguise or justify the decision on the basis of the contract. The panel recognized the ninety-day limitation but extended it on the premise of providing equity to plaintiff and disincentive to defendant for further wrongful terminations. (Doc. 27, Ex. A at 6).

C. RESORT TO EQUITABLE GROUNDS WAS IMPERMISSIBLE

Plaintiff argues the panel's resort to equitable grounds as justification for its award was permissible. Specifically, plaintiff contends the American Arbitration Association (AAA) National Rules for the Resolution of Employment Disputes ("AAA Rules") permit arbitrators to "grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court." AAA Rule 32(c) (emphasis added). The AAA Rules provide a basis for the panel's authority in this matter because they were incorporated by reference in the contract, but the provision relied on by plaintiff does not provide the immense breadth of arbitral authority suggested, nor justify the award. Under plaintiff's

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7/ Similarly, nothing in the contract permitted a finding that plaintiff's termination was "tantamount" to no termination. The contract expressly provided plaintiff could be terminated at any time for any reason. (Doc. 27, Ex. B at 5, ¶ 5(f)).

reasoning, the arbitrators essentially had carte blanche to do anything they desired.

The provision does not support plaintiff's assertion. AAA Rule 32(c) is limited to fashioning a particular remedy; it does not permit the creation of rights that are otherwise unidentified in the contract. "[A] remedy is the means employed to enforce a right or redress an injury." Chelentis v. Luckenbach S.S. Co., Inc., 247 U.S. 372, 384, 38 S. Ct. 501, 504, 62 L. Ed. 1171 (1918). As the panel recognized, plaintiff had the right to all of his unvested options at the time of his termination, and the right to exercise those options within ninety days of his termination. Arbitral authority existed to remedy defendant's refusal to afford plaintiff these rights. The award went beyond that authority by creating a right to an extension based on defendant's actions despite a contradictory contractual provision. Such authority is not found in the contract nor in the AAA rules.

In a case involving a similar rule,[8/] the Third Circuit vacated an arbitral award requiring a defendant to provide a bond despite the contract's silence on such a remedy. See

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8/ The court has been unable to identify any cases discussing the exact AAA employment dispute rule. However, numerous cases discuss a similar rule applicable in other arbitration contexts which specifies an arbitrator may award "any remedy or relief that the arbitrator deems just and equitable, and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." See AAA Commercial Arbitration Rule 43 (emphasis added). None of the cases cited by the parties address the particular AAA Rule involved in this matter which does not include the emphasized language.

Swift Indus., Inc. v. Botany Ind., Inc., 466 F.2d 1125, 1133-34 (1972).

> We subscribe to the observations of the Enterprise court that the draftsmen may be unable to perceive in advance what specific remedy should be awarded to meet a particular contingency and that in arbitration flexibility is important. But the principle of flexibility of relief cannot be permitted to obscure or to effect a metamorphosis of the claim itself. That untoward event would occur if we were to permit the arbitrator's award to stand in this case.

466 F.2d at 11-33-34; see also Leed Architectural Prod. v. Local 6674, 916 F.2d 63, 65 (2d Cir. 1990) (An arbitrator may not "impose a remedy which directly contradicts the express language of the [contract]"). In short, arbitral authority to extend plaintiff's option exercise period cannot be based on the principle of remedial leeway when the award actually creates a right contrary to the express terms of the contract.

As just as the panel's result seems,[9/] the parties did not empower the panel to do what it believed was fair or equitable. As the Supreme Court stated in Enterprise Wheel:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice .... When the arbitrator's words manifest an infidelity to this obligation,

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9/ The court understands and appreciates the arbitrators' motives. Plaintiff was badly treated by Levin. This is the second case in this court of mistreatment of a long-term employee by Coleman management, albeit different management. See Marsh v. Coleman Co., Inc., Civil Action No. 90-1030-MLB.

> courts have no choice but to refuse enforcement of the award."

363 U.S. at 597, 80 S.Ct. 1361. Here, the panel was empowered to enforce and interpret the terms of the contract upon which the parties agreed, not dispense its own sense of employment justice. To permit the award to stand would undermine the validity and utility of the arbitral process. Because the panel justified its award on equitable considerations, a concept upon which it was not entitled to rely, the award fails to draw its essence from the contract. See St. Louis Theatrical Co. v. St. Louis Theatrical Bhd. Local 6 of the Int'l Alliance of Theatrical Stage Employees & Moving Pictures Operators, 715 F.2d 405, 409 (8th Cir. 1983) (award vacated where "arbitrator's opinion reflected . . . [his] efforts to balance the equities of the situation, rather than to interpret and apply the agreement").

IV. THE DEFAMATION AWARD

Defendant also claims the arbitral award of damages on plaintiff's defamation claim should be vacated because defamation falls outside the scope of the arbitration clause. (Doc. 26 at 18-19). The arbitration clause provides, "[a]ll disputes or controversies arising under or in connection with this Agreement . . . will be settled exclusively by arbitration." (Doc. 27, Ex. B at 14, ¶ 19). Defendant contends that because a defamation claim exists independently of the contract, the claim does not "aris[e] under or in connection" with the contract.

A. SCOPE OF AGREEMENTS TO ARBITRATE

"It is the province of the court, not the arbitrator, to determine whether a party has a duty to arbitrate." ARW, 45 F.3d at 1461 (citing AT & T Technologies, 475 U.S. at 649, 106 S.Ct. at 1418-19). For this reason, the panel's conclusion that it had authority to arbitrate the defamation claim receives no deference from this court.

> The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, "evinces a strong federal policy in favor of arbitration." ARW Exploration Corp. v. Aguirre, 45 F.3d 1455, 1462 (10th Cir. 1995) (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 185 (1987)). The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 111 S. Ct. 1647, 1651, 114 L.Ed.2d 26 (1991). "If a contract contains an arbitration clause, a presumption of arbitrability arises." ARW, 45 F.3d at 1462 (citing AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650, 106 S. Ct. 1415, 1419, 89 L.Ed.2d 648 (1986)). This presumption may be overcome only if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Id. All doubts should be resolved in favor of coverage. Id. As the Supreme Court stated in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941, 74 L.Ed.2d 765 (1983):

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

See also Esposito v. Hyer, Bikson & Hinsen, Inc., 709 F.Supp. 1020, 1022 (D. Kan. 1988) (quoting Moses H. Cone, and noting that the Supreme Court has given its "stamp of approval" to the principle that arbitration provisions are to be construed broadly to effectuate the strong federal policy evidenced by the Federal Arbitration Act). Courts are to "rigorously" enforce agreements to arbitrate. ARW 45 F.3d at 1462 (citing McMahon, 482 U.S. at 226, 107 S.Ct. at 2337).

Peruvian Connection, Ltd. v. Christian, 977 F. Supp. 1107, 1109 (D. Kan. 1997).

B. THE PARTIES' AGREEMENT TO ARBITRATE

Initially, it must be noted that the arbitration clause employs broad language covering copious claims that may arise between the parties. See, e.g., Oldroyd v. Elmira Savings Bank, FSB, 134 F.3d 72, 76 (2d Cir. 1998) (stating that a clause requiring arbitration of "[a]ny dispute, controversy or claim arising under or in connection" with the contract was prototypical of a broad arbitration provision (brackets in original)); Pennzoil Exploration and Prod. Co. v. Ramco Energy Ltd., 139 F.3d 1061, 1067 (5th Cir. 1998) (recognizing the distinction between narrow arbitration clauses, which require arbitration of disputes "arising out of" the contract,

from "broad" clauses governing disputes that "relate to" or "are connected with" the contract); American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996) (recognizing that "arising in connection with" language denotes a clause encompassing a broad scope of arbitral issues); Trading Place Aeronautica, S.L. v. Raytheon Aircraft Corp., 35 F. Supp. 2d 1308, 1311 (D. Kan. 1999) (identifying an agreement to arbitrate "[a]ny dispute, controversy or claim arising out of or in connection with" the contract as a broad arbitration clause).

Given the broad nature of the arbitration clause, a presumption of arbitrability of the defamation claim is clearly implicated. See ARW, 45 F.3d at 1462. ("If a contract contains an arbitration clause, a presumption of arbitrability arises, particularly if the clause in question contains the same broad and sweeping language that these clauses possess").[10/] However, despite its breadth, the court recognizes there are limits to the claims covered by broad arbitration clauses. See Pennzoil Exploration, 139 F.3d at 1067 n.8. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 605, 624 n.14, 105 S. Ct. 3346, 3352 n.14, 87 L. Ed. 2d 444 (1985),

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10/ The simple fact that the contract contains a broad arbitration clause undermines defendant's argument that plaintiff's defamation claim is not subject to arbitration because it exists independently of the contract. See, e.g., Maldonado v. PPG Indus., Inc., 514 F.2d 614, 616 (1st Cir. 1975) ("Broad language of this nature covers contract-generated or contract-related disputes between the parties however labeled; it is immaterial whether claims are in contract or in tort"); see also Ketchum v. Bloodstock, 685, F. Supp. 786, 792 (D. Kan. 1988) (recognizing that claims may be arbitrated despite the legal labels attached to them).

the Supreme Court discussed the limitations of a broad arbitration clause and stated that matters are covered by the clause if the allegations underlying a particular claim "touch matters" covered by the contract;[11/] see also Oldroyd, 134 F.3d at 77 ("If the allegations underlying the claims 'touch matters' covered by the parties' [contracts], then those claims must be arbitrated, whatever the legal labels attached to them"); Pennzoil Exploration, 139 F.3d 1068 (it is only necessary that a dispute touch matters covered by the contract). With this guidance, the court considers whether it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers plaintiff's defamation claim.

C. FACTUALLY SIMILAR CASES

In support of their positions regarding the arbitrability of plaintiff's defamation claim, both parties rely heavily on Leadertex v Morganton Dyeing & Finishing Corp., 67 F.3d 20 (2d Cir. 1995). In Leadertex, a dispute arose between parties to a contractual arrangement involving the dyeing and storage of fabric. The contracts involved in the dispute contained an arbitration clause which required "[a]ny controversy or claim arising under or in relation to" the contracts to be settled by arbitration. See id. at 23. Leadertex filed numerous claims in federal court including an allegation that Morganton made

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11/ Mitsubishi Motors involved a clause requiring arbitration of all "disputes, controversies or differences which may arise between [the parties] out of or in relation to" the parties agreement. 473 U.S. at 617, 105 S. Ct. 3349. In J. J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (1988), the Fourth Circuit found that there is essentially no difference between the phrases "in connection with" and "may arise out of or in relation to."

defamatory statements,[12/] and Morganton sought an order compelling arbitration. See id. at 23-24.

In determining whether the defamation claim was subject to arbitration, the Second Circuit noted, "[t]he exact content of the allegedly defamatory statement must be closely examined to see whether it extends to matters beyond the parties' contractual relationship." Id. at 28. Reviewing the statement and the contract, the court noted that the alleged statements "implicat[ed] matters beyond the contractual performance of the parties." See id. Further, the court concluded the alleged defamatory statements were not subject to arbitration because "[n]one of these representations [was] about the contract between Morganton and Leadertex, which set forth only their agreement for Morganton to provide dyeing and warehousing services to Leadertex." See id. (emphasis added).

Both parties also rely on McMahon v. RMS Elec., Inc., 618 F. Supp. 189 (S.D.N.Y. 1985), which involved a judicial determination of whether defamatory statements by an employer were subject to arbitration under an employment contract. The contract required that "'[a]ll disputes and claims arising in connection with the Agreement' shall be settled in arbitration." Id. at 190. The case involved an employee who filed a claim for breach of an employment agreement, which only permitted the employee to be fired for cause, in addition

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12/ "Morganton allegedly represented that Leadertex was (1) generally dishonest in its business practices, (2) incapable of supplying conforming goods to manufacturers, (3) in the practice of selling defective goods, and (4) guilty of attempting to defraud [one of Leadertex's customers] by shipping it defective goods." Leadertex, 67 F.3d at 28.

to three defamation claims. See id. at 190-91. The defamation claims were based on the employer's statements contained in a Securities and Exchange Commission (SEC) filing and in a notice to its shareholders that the employee's contract was terminated, and on a statement made a week before the termination by the employer's president that the employee was the "company drunk" and was interfering with the president's operation of the business. See id. at 191.

The McMahon court concluded the defamation claims based on the SEC filing and the shareholder notice were subject to arbitration, but the statement by the president was not. See id. at 192. In making its decision, the court focused on whether there was a "nexus" between the employment relationship and the defamatory statements. See id. at 192. The court found a nexus between the statements contained in the SEC filing and shareholder notice and the employment contract because the employer was required to report the termination in both documents. Therefore, whether a defamation claim existed depended directly on an interpretation of the contract as to whether the employee was terminated with cause as permitted by the contract. See id. at 192. In contrast, the court concluded the president's statement was not subject to arbitration because resolution of that particular claim did not require reference to the underlying contract despite the statements relevance to

whether the employee was terminated without cause.[13] See id. at 193.

D. THE PARTIES' ARGUMENTS

Defendant, relying on Leadertex, claims the statements implicate matters beyond the contractual relationship between the parties. (Doc. 26 at 21). In addition, defendant argues Levin's statements more closely resemble those made by the employer's president in McMahon and should not be subject to arbitration because resolution of the defamation claim does not turn on an interpretation of the contract.[14] (Doc. 32 at 8). In contrast, plaintiff claims the statements are distinguishable from those in Leadertex because they relate to matters covered

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13/ Defendant, in its reply brief, cites Entech Systems v. Bhaskar, 1998 WL 16432 (D. Kan. March 18, 1998), an unpublished opinion by Judge Lungstrum, claiming it supports the argument that the defamation claim was not subject to arbitration. (Doc. 32 at 6). The court is not persuaded. The arbitration clause is significantly distinct and much more detailed than the clause currently before the court, see 1998 WL 16432 *1-2, and there is little legal analysis. Because the court places no reliance on the case, plaintiff's motion to file a sur-reply, or alternatively striking portions of defendant's brief (Doc. 34), addressing the decision is denied.

14/ Defendant's brief also includes a footnote stating that plaintiff would not have been entitled to punitive damages under Nebraska law if the claim had been resolved by judicial means. (Doc. 26 at 19 n.5). Although the footnote is evidently not intended to challenge the award of punitive damages, the court notes that the language of the parties' agreement governs whether punitive damages are permitted if the claim is subject to arbitration, not the law of the state that would apply in a judicial determination of the issue. See Kelley v. Michaels, 59 F.3d 1050, 1054-55 (10th Cir. 1995).

by the contract, i.e., the basis for plaintiff's termination under the provisions of the contract. (Doc. 30 at 18.) Additionally, he argues arbitration is required because the statements relate to his termination in a manner similar to those contained in the SEC filing and shareholder notice in McMahon. Similarity arguably exists because Levin's statements are relevant to plaintiff's claim that he was wrongfully terminated under the contract. However, resolution of the defamation claim does not require an interpretation of the contract. Under McMahon's reasoning, plaintiff's defamation claim does not arise under or in connection with the employment contract because it does not turn on an interpretation of the parties' agreement.

Giving McMahon its literal meaning, the court places little reliance on the decision because it fails to afford the presumption of arbitrability its obligatory weight. As the Supreme Court stated in AT&T Technologies, Inc. v Communications Workers of America, 475 U.S. 643, 650, 106 S. Ct. 1415, 1419, 89 L.Ed. 2d 648 (1986), "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Absent from McMahon is any discussion or recognition of the presumption or how the party opposing arbitrability established that the contract was not subject to an interpretation permitting arbitration of the claim. Focusing merely on whether the claim requires an interpretation of the contract is too limited an inquiry to determine the scope of arbitration.

Instead, the court focuses on the Second Circuit's decision in Leadertex, which the court believes affords a more appropriate inquiry when determining whether a defamation

claim falls within the bounds of a broad arbitration clause.[15/] Under Leadertex, the focus is on whether Levin's statements were related to the parties' contractual obligations or rights under the contract, or whether they implicated matters beyond the contractual relationship. It is not necessary to resort to contract interpretation. Despite defendant's argument otherwise, Levin's statements were clearly directed at matters related to the contract. First, Levin's statements to Powermate employees explained the supposed reasons for plaintiff's termination and were directed at plaintiff's failure to perform his obligations under the terms of his employment contract. See doc. 27, ex. B at 1, ¶ 2 (outlining plaintiff's duties to the corporation), and 9, ¶ 9(b) (prohibiting plaintiff from disclosing confidential information). Second, by explaining to Powermate employees why plaintiff was fired, Levin's statements implicated the contractual provisions dealing with the circumstances in which plaintiff could be fired for cause. See doc. 27, ex. B at 4-5, ¶ 5 (detailing in what circumstances plaintiff may be fired for cause and that he may be fired without cause). Moreover, the statements relate to defendant's actual decision that plaintiff's actions justified a for cause termination. Finally, the statements were made contemporaneous with the firing to plaintiff's former co-workers for the express purpose of attempting to explain the firing.

15/ Leadertex clearly addresses the broad presumption of arbitrability and the hurdles the party opposing arbitration must overcome to prove a matter does not fall within the scope of an arbitration clause. 67 F.3d at 27 (discussing the relevant inquiry).

Thus, unlike Leadertex, the statements in this matter relate to the contract governing the relationship between plaintiff and defendant. Furthermore, defendant has not provided "forceful evidence" of a purpose to exclude a defamation claim from the agreement to arbitrate. For these reasons, the court cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers plaintiff's defamation claim. Thus, the arbitrators had authority under the contract to arbitrate the defamation claim, and the award is affirmed.

V. POST-AWARD INTEREST

In diversity actions, a district court applies state law to determine the issue of prejudgment interest. See Strickland Tower Maintenance, Inc. v. AT & T Communications, Inc., 128 F.3d 1422, 1429 (10th Cir. 1997).

> The general rule in Kansas is that prejudgment interest is allowable on liquidated claims. Federal Land Bank of Wichita v. Vann, 20 Kan. App. 2d 635, 641, 890 P.2d 1242 (1995). A claim becomes liquidated when both the amount due and the date on which it is due are fixed and certain. Id.

James M. Caplinger, Chartered v. Lundgren, 905 F. Supp. 876, 892 (D. Kan. 1995). Once an arbitration award is confirmed, the amount becomes fixed. Thus, plaintiff is entitled to post-award, prejudgment interest on the confirmed portion of the award, $1,295,575, beginning from January 7, 1999.[16/] The

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16/ The panel ordered defendant to pay the award to plaintiff on or before January 6, 1999. (Doc. 27, Ex A, "Award of Arbitrator"

applicable rate is 10% per annum. See K.S.A. § 16-201; see also Northrop Corp. v. Triad Int'l Mktg., 842 F.2d 1154, 1155 (9th Cir. 1988) ("The recognized general rule is that state law determines the rate of prejudgment interest in diversity actions" seeking enforcement of arbitration awards under the FAA).

VI. CONCLUSION

For the reasons discussed in this memorandum, defendant's motion to vacate portions of the arbitration award (Doc. 25) and plaintiff's cross-motion to confirm the award (Doc. 35) are granted in part and denied in part. The $2,322,335 awarded for plaintiff's stock options fails to draw its essence from the contract and is therefore vacated. The remainder of the award is confirmed.[17/] Furthermore, plaintiff's motion for post-award interest (Doc. 35) is granted. Plaintiff is entitled to post-award, prejudgment interest on the confirmed portion of the award, at the rate of 10% per annum, for the period beginning January 7, 1999 and ending on the date judgment is entered in this case.

A motion for reconsideration of this order pursuant to D. Kan. Rule 7.3 is not encouraged. The standards governing motions to reconsider are well established. A motion to reconsider is appropriate where the court has obviously misapprehended a party's position or the facts or applicable law, or where the party produces new evidence that could not have been obtained through the exercise of reasonable diligence. Revisiting the issues already addressed is not the

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at 2).

17/ Plaintiff's motion for oral argument (Doc. 40) is moot.

purpose of a motion to reconsider and advancing new arguments or supporting facts which were otherwise available for presentation when the original motion was briefed or argued is inappropriate. Comeau v. Rupp, 810 F. Supp. 1172 (D. Kan. 1992). Any such motion shall not exceed 5 pages, and the response to any motion for reconsideration shall not exceed 5 pages. No reply shall be filed.

IT IS SO ORDERED.

Dated this 12 day of May 1999, at Wichita, Kansas.

/s/ Monti L. Belot
Monti L. Belot
UNITED STATES DISTRICT JUDGE

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION

Employment Arbitration Tribunal

In the Matter of the Arbitration between

Re: 57 160 00026 98
Gerald E. Brown
vs.
The Coleman Company
-Kansas City, Missouri

ADMINISTRATOR: Kristin M. Lerner

AWARD OF ARBITRATOR

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the personnel manual or employment agreement entered into by the above-named parties, and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD as follows:

The Coleman Company ("Coleman") shall pay to Gerald E. Brown ("Brown") the sum of Three Million Two Hundred Sixty Seven Thousand Nine Hundred Twenty Nine Dollars and No Cents ($3,267,929.00) for his claims of breach of employment contract and wrongful termination as itemized below:

Base Salary	$ 450,000.00
Two Year Bonus	315,000.00
Health Insurance	8,481.00
Life Insurance	2,800.00
Disability Insurance	2,280.00
Automobile	17,400.00
Club Membership	15,200.00
Outplacement Support	0.00
Personal Estate/Tax Planning	6,000.00
Pro Rata 1997 Incentive	74,844.00
Vested Stock Options	53,589.00
Option Money	2,322,335.00
Total	$3,267,929.00

Coleman shall pay to Brown the sum of Three Hundred Fifty Thousand One Dollars and No Cents ($350,001.00) for his defamation claim as itemized below:

Nominal Actual Damages	$ 1.00
Punitive Damages	350,000.00
Total	$350,001.00

The counterclaims submitted by Coleman are hereby denied.

The above sums are to be paid on or before January 6, 1999. If Coleman wishes the arbitrators to consider alternative payment options, it may submit a request within fourteen (14) days of the final date of this Award.

Coleman shall pay to Brown his reasonable attorneys' fees and costs. If the parties are unable to stipulate to remaining attorney's fees within fifteen (15) days of the final date of this Award, then Brown shall submit an application for fees and expenses within seven (7) days thereafter, with Coleman's response due within seven (7) days after Brown's submission.

The arbitrators shall retain jurisdiction of this cause for forty-five (45) days from the final date of this Award for the purpose of resolving any disputes regarding reasonable attorneys' fees and costs.

The administrative fees and expenses of the American Arbitration Association ("the Association") totaling $8,561.25 shall be borne by Coleman. Therefore, Coleman shall pay to Brown the sum of $1,400.00 representing that portion of Brown's share of administrative fees and expenses previously paid to the Association. Coleman shall pay to the Association the sum of $11.25 representing that portion of Coleman's share of administrative fees and expenses still due the Association.

The compensation and expenses of the arbitrators totaling $37,354.63 shall be borne by Coleman. Therefore, Coleman shall pay to Brown the sum of $15,200.00 representing that portion of Brown's share of compensation and expenses previously advanced to the Association. Coleman shall pay to the Association the sum of $6,954.63 representing that portion of Coleman's share of arbitrator compensation and expenses still due the arbitrators.

The administrative fees and expenses of the Association and the compensation and expenses of the arbitrators are to be paid on or before thirty (30) days from the final date of this Award.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are, hereby, denied.

SIGNED: /s/John R. Phillips DATED: 9/30/98
John R. Phillips, Arbitrator

SIGNED: /s/Richard F. Adams DATED: 9/30/98
Richard F. Adams, Arbitrator

SIGNED: /s/Byron J. Beck DATED: 9/30/98
Byron J. Beck, Arbitrator

AMERICAN ARBITRATION ASSOCIATION

GERALD E. BROWN,	)	
	)	
Petitioner,	)	
	)	No. 57 160 00026 98
v.	)	
	)	
THE COLEMAN COMPANY,	)	
	)	
Respondent.	)	

ARBITRATORS' OPINION AND AWARD

The Arbitration Panel hereby issues the following opinion on the claims raised in this matter.

Breach of Employment Contract and Wrongful Termination

The employment contract between Brown and Coleman states that Mr. Brown could only be terminated "for cause" under the following standards of conduct:

> "Cause means (i) the willful and continued failure by the Executive to substantially perform the Executive's duties with the Corporation (other than any such failure resulting from the Executive's incapacity due to physical or mental illness) or (ii) the willful engaging by the Executive in conduct which is demonstrably and materially injurious to the corporation, monetarily or otherwise. For purposes of the preceding sentence, no act, or failure to act, on the Executive's part will be deemed "willful" unless done, or omitted to be done, by the Executive not in good faith and

without reasonable belief that the Executive's act, or failure to act, was in the best interest of the Corporation."

There was substantial, credible evidence that prior to Mr. Brown's management buyout attempt that Mr. Brown had been a very good employee. He had served the company for 23 years. His work was praised by Mr. Levin in March of 1997. The company had automatically renewed his contract and had never given Mr. Brown a six-month notice prior to the annual renewal date that the contract was not to be renewed.

When Mr. Brown was instructed in the spring of 1997 to aid in the planned divestiture of the Compressor Division, he used his best efforts and aided in presentations to potential buyers. Mr. Brown's presentations were not criticized and, indeed, the apparent head of the divestiture effort, Bob Knibb of McAndrews & Forbes ("MYF"), believed that Mr. Brown used his best efforts to sell the business and did not attempt to frustrate the sale. Through May 28, 1997, "Gerry Brown was putting his best foot forward for his employer, The Coleman Company." Potential buyers, such as RV Products, agreed.

The panel concludes that Mr. Brown's performance of his duties through the last sales presentation to RV Products on May 28, 1997, was exemplary and in the best interest of Coleman, and there was no cause to that point for his termination. (R. Ex. 1)

Coleman had set a target date of June 30, 1997 for the Compressor Division to be sold and Mr. Knibb of M&F was under pressure to accomplish that goal. The pressure was created largely by the desire of M&F to satisfy covenant requirements that M&F believed might be in default if a sale was not accomplished by the June 30 date. The presentation to

RV Products on May 28, 1997 was unsuccessful. There was no evidence of any other potential purchasers.

On May 29 and 30, Mr. Brown evidenced to other management employees an interest in having a management team purchase the division. This team would consist of Mr. Brown, Mike Hawes, Ron Griffin, and Mark Matthews.

Mr. Brown called Bob Knibb on June 2 or 3 and told Mr. Knibb that he (Brown) and the other management people were interested in pursuing a management buyout of the compressor Division. Mr. Knibb stated that he would take the matter up with Mr. Levin and get back to Mr. Brown. Mr. Knibb did not, during the telephone conversation, remind Mr. Brown of any contract confidentiality provisions, nor after Mr. Knibb talked to Mr. Levin about Mr. Brown's interest in a management buyout ("MBO"), did Mr. Levin tell Mr. Knibb to call Mr. Brown back and tell him, "No, don't pursue it." Neither Mr. Levin nor Mr. Knibb, at any time, indicated an unwillingness on the part of M&F or Coleman to engage in negotiations with Mr. Brown for an MBO for any reason, including a conflict of interest and confidentiality concerns. The very reasonable assumption is that Mr. Knibb, Mr. Levin and M&F were interested in pursuing an MBO with Mr. Brown's team. Certainly, Mr. Brown was justified in so assuming.

Mr. Brown thereafter took steps to arrange financing for the team. He contacted Coopers & Lybrand. On June 6, 1997, he also retained Virtual Strategies to assist the team. Mr. Brown and the other team members traveled to Chicago on June 11 to talk with four venture capitalists. Each of the venture capitalists signed a confidentiality agreement. (The materiality of the information was never adequately explained

at the hearing. Much of the information had already been supplied to possible purchasers in the divestiture attempts through May 28.)

With no refusal by Mr. Knibb and Mr. Levin to entertain a MBO, with no other purchasers in the wings and with Mr. Brown's understanding of the June 30 pressure date, Mr. Brown was justified in pursuing the MBO. There was no demonstrated damage to Coleman that resulted from Mr. Brown's Actions and there certainly was a great benefit to Coleman if the MBO had been successful. There was no conflict of interest.

On June 13, 1997, Mr. Levin, Mr. Brown, Mr. Knibb, and Robert Esterman traveled from Omaha to Kearney. During that flight, Mr. Brown brought up the MBO and there were negotiations concerning the MBO. There was no mention of a conflict of interest, nor did Mr. Levin or Mr. Knibb explain any procedure M&F uses in MBO's. The parties talked about price with Mr. Brown offering $50 million and Mr. Levin replying the price had to start with a "6." Mr. Levin never told Mr. Brown that he could not make a management buyout offer. If there had been any ambiguity about the situation before June 13, there certainly was none after the plane trip. Coleman gave tacit approval for Mr. Brown to continue with negotiations.

On Monday, June 16, 1997, Mr. Brown faxed an offer to Mr. Levin and Mr. Knibb. Mr. Levin stated that Mr. Brown had violated "all the rules" and decided to terminate Mr. Brown. The panel concludes that Mr. Brown was justified in believing he could pursue the MBO and that there was no conflict. Also, there was no breach of fiduciary because it was

an arms-length transaction between a buyer and seller, and was in the best interests of Coleman.

Mr. Brown was summoned to New York on June 19, 1997, and summarily terminated. Mr. Levin would not allow Mr. Brown to explain. There was no just cause for the termination for the reasons of conflict of interest, breach of confidentiality or breach of fiduciary obligation. Mr. Levin was totally unjustified in terminating Mr. Brown. The panel further concludes that Mr. Levin's termination of Mr. Brown cannot be considered a "for cause" termination as Mr. Brown did not violate the standards of conduct under Paragraph 5(c) of the employment contract.

The Kearney episode was not an issue. Coleman's July 9, 1997 termination letter made no mention of it. It was not a subject of Piper's investigation of Mr. Brown. The planned move to Kearney had already been rejected for economic reasons by Mr. Levin. It was logical that Mr. Brown would personally prefer to move to Kearney, which is his hometown area.

The testimony of Richard Hawkes concerning the Kearney episode is not credible. His contemporaneous notes do not support his testimony. There was no corroborating evidence of Hawkes' testimony. Coleman offered no evidence that it had suffered any damage. The panel finds against Coleman on this issue.

The use of the corporate jet involved the sum of $2,000 for the cost of the flight. It was not materially damaging to Coleman. Coleman could have asked the team members to reimburse Coleman, but never did so.

Mr. Brown contended that flights were used for personal reasons. The records that might prove this were "missing," however. There was no breach of any obligation owed by Mr. Brown to Coleman and there was no conflict of interest.

The panel concludes that Coleman Company, Inc. breached its employment contract with Gerald Brown and wrongfully terminated him and, as a direct result, Mr. Brown suffered damages.

Damages for Breach of Employment Contract and Wrongful Termination

The panel concludes that Mr. Brown is entitled to the following damages for Coleman's breach of the employment contract and wrongful termination as set forth in A and B below:

A.

Base Salary	$450,000
Two Year Bonus	$315,000
Health Insurance	$ 8,481
Life Insurance	$ 2,800
Disability Insurance	$ 2,280
Automobile	$ 17,400
Club Membership	$ 15,200
Outplacement Support	$ 0
Personal Estate/Tax Planning	$ 6,000
Pro Rata 1997 Incentive	$ 74,844
Vested Stock Options	$ 53,589
TOTAL	$945,594

B.

The panel agrees with the analysis of Coleman in its post hearing brief which appears at the bottom of Page 21 and the top of Page 22. If an employee fails to fight or loses his fight for improper termination, Coleman reaps the benefit applicable to such termination. If Coleman loses, Coleman simply falls back on the not-for-cause termination and ends up paying the employee only what it should have paid in the first place. We agree that there would be no disincentive for Coleman to avoid wrongfully terminating employees and that Coleman would reap a windfall with absolutely no risk. That would not be an equitable result and would be a result that we cannot allow to occur here.

There was evidence that Coleman was discussing during the summer of Mr. Brown's termination a possible sale of all of Powermate. Further, a fair implication is that the divestiture, started in the spring of 1997, was a continuing effort which may have resulted in a sale of the Compressor Division, all of Powermate or a sale of all of Coleman such as occurred. The evidence fairly implied that M&F was and is in the business of buying and selling companies on a continuing basis. There apparently was no clear line of when they were selling or buying or when they were not. Neither was there a clear line for what they were selling, whether it was a division or, if the right deal was offered, all of the companies in the portfolio.

It is also fair to infer from the totality of the evidence that there was absolutely no basis for Coleman to choose to terminate for cause. There were reasons given by Coleman for the termination that appeared to be after the fact of termination reasons, almost to the point of inventing those reasons.

It may be fairly inferred from the evidence that one of Coleman's considerations in choosing a "for cause" termination was to avoid paying Mr. Brown for what he was entitled to receive under the contract if his termination was without cause. The cases that are cited by Mr. Brown on Pages 23 and 24[1/] of his post hearing brief are persuasive. Those cases grant an extension of the terms of the options. We believe that to be an equitable solution here. We also conclude that Mr. Brown was terminated without just cause and that Coleman would have been unjustly enriched if Mr. Brown were deprived of the option money to which he would have been entitled in a change of control situation. Furthermore, the wrongful termination was tantamount to no termination at all and Mr. Brown is entitled to the additional option money for that reason also.

We conclude, generally, that damages set forth in Mr. Brown's Exhibit 13 are fair and, under the evidence, properly computed. Mitigation does not apply because we have found that Mr. Brown should have been allowed to continue his employment.[2/] Mr. Brown exercised the options as he was required to do. The sale was October 8, 1997. (Coleman Ex.

1/ Bertero v. National General Corp., 254 Cal. App. 2d 126 (1967); Haft v. Dart Group Corp., 877 F. Supp. 896, 904 (D. Del. 1995); Haag v. International Telephone and Telegraph Corp., 324 F. 2d 205, 208 (7th Cir. 1963); Langer v. Iowa Beef Packers, 420 F.2d 365, 368-69 (8th Cir. 1970).

2/ In any event, Mr. Brown made efforts to secure employment, but was unsuccessful. Therefore, if it were appropriate to consider whether mitigation is relevant, we conclude that Mr. Brown satisfied the requirement and we would not deduct any amount from the award.

19-A) We cannot tell in Mr. Brown's Exhibit 13 whether Mr. Brown has taken into account in the computation the gain he had already realized. We choose to deduct from the Exhibit 13 damages only the sum of $53,589.00 (Brown Ex. 12) and award the sum of $2,322,335.00.

Defamation Claim

The Coleman Company (hereinafter "Coleman") objected to Gerald Brown's (hereinafter "Mr. Brown") defamation claim by claiming that it was not arbitrable, i.e., that it did not fall within the definition of the contract's arbitration clause. We have concluded that this claim is arbitrable.

First, the arbitration clause is very broad. It states:

> All disputes or controversies arising under or in connection with this Agreement . . . will be settled exclusively by arbitration, in Wichita, Kansas, in accordance with the rules of the American Arbitration association then in effect.

Courts have construed arbitration clauses to cover defamation claims if they rise out of employment or termination of employment. See Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163, 1168 (8th Cir. 1984) (finding defamation claims about employee's performance arbitrable under broker's NYSE arbitration clause that governed his employment because claims "arose out of his employment or termination of employment with Smith Barney"); McMahon v. RMS Electronics, Inc., 618 F. Supp. 189, 192 (S.D. N.Y. 1985) (finding plaintiff's defamation claims arbitrable under the arbitration clause in an employment agreement because they were "integrally linked to the

contractual relationship between the parties" and "necessarily turn on whether he was terminated with or without cause, an issue which involves an interpretation of the contractual relationship of the parties"); Izzi v. Mesquite Country Club, 186 Cal. App. 3d 1309 (1986) (finding in situations where contracts provide for arbitration of any controversy arising out of or related to employment contracts, courts have held such arbitration agreements broad enough to include tort claims as long as they "have their roots in the relationship between the parties which was created by the contract"); Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047, 1053 (2d Cir. 1989) (holding that defamation claim for statement that broker lost his license and was "basically a criminal" were relevant to job performance and evaluation of the employee/employer contractual relationship and thus were arbitrable under the employment contract's arbitration clause).

Another principle which provides a guide to a determination of this issue is expressed in Morgan, Id. Supra, where the court states:

> The second principle commands that when contract language is ambiguous or unclear, a "healthy regard" for the federal policy favoring arbitration requires that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."

Since the parties agreed to arbitrate all disputes and controversies arising under or in connection with this agreement, we believe this principle is applicable here.

In the instant case, the defamatory statements which state reasons for the termination of Mr. Brown relate to Brown's contract and whether he was terminated for cause. We agree

that the arbitrability standard as set forth by the courts above has been met.

After reviewing the procedures and orders entered by the arbitration panel, we also find that the proper procedures were followed to amend the arbitration demand to include this defamation claim.

We now turn to the merits of the claim for defamation.

The tort of slander requires: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement regardless of the harm or the existence of a special harm caused by the publication. Norris v. Hathaway, 5 Neb. App. 544, 547-8, 561 N.W.2d 583, 585 (1997).

The specific claim of defamation here involves a statement by Mr. Levin to the employees of The Coleman Powermate Division in Omaha and Kearney, Nebraska. According to the credible and substantial evidence, on June 20, 1997, Mr. Levin stated that Mr. Brown was terminated for "misuse of company assets and other illegal activity; or misuse of company funds." (Brown Exhibit 14, Joan Kost Stipulation; Brown Exhibit 27, Hawkes 6/19/97 day planner notes.) Mr. Levin testified on cross-examination:

QUESTION: You told them that Mr. Brown admitted misusing corporate assets; isn't that right?

ANSWER: I might have.

QUESTION: You told them that he had misappropriated corporate assets; isn't that right?

ANSWER: Quite plausible, by then we knew the facts.

QUESTION: You didn't explain what that meant, did you?

ANSWER: I don't remember.

(Tr. Pp. 705-706)

Based on the evidence, we find that this statement was made by Mr. Levin to an assembled group of employees of The Coleman Powermate Division.

The panel finds that this statement constitutes slander per se.

Under Nebraska law, which is controlling here, a determination as to whether a statement is actionable per se depends on how it is construed in its ordinary and popular sense. Hennis v. O'Connor, et al., 223 Neb. 112, 116, 388 N.W. 2d 470, 474 (1986). The Court should not ". . . strain to find innocent meaning for statements which are prima facie defamatory. Id. If the statement is clear and unambiguous, the plaintiff must prove only that the defendant made the statement. Id. At 449. Reckless disregard of the truth constitutes actual malice. Hoch v. Prokop, 244 Neb. 443, 445, 507 N.W. 2d 626, 629 (1993).

In the Joan Kost Stipulation (Brown Exhibit 14), she stated that the impression from Mr. Levin's statements was that Brown was being accused of having been involved in some form of criminal conduct. We believe a reasonable person would conclude from Mr. Levin's statement that Mr. Brown

committed some illegal or criminal activity. Mr. Levin had no basis to make a statement that was likely to be construed as an accusation of criminal conduct on the part of Mr. Brown. Since we believe that Mr. Levin's statement that Mr. Brown did engage in some type of illegal or criminal activity is clear and unambiguous on its face, it is actionable per se.

Respondent Coleman also claims that the statements by Mr. Levin were privileged. We do not agree. The qualified privileged doctrine is set out in Turner v. Welliver & Nebraska All Risk Crop. Co., 226 Neb. 275, 288, 411 N.W.2d 298, 307 (1987), where it is defined as communications made in good faith, without actual malice, with reasonable grounds for believing the statements, and on a subject matter the speaker has a duty to disclose and are made to a person having a corresponding duty.

Mr. Levin's statement does not meet these tests. Prior to June 19, 1997, Mr. Levin had received Brown and his partners' offer to purchase the compressor division for $55 million and the Wind Point partner's letter expressing its interest. (Coleman Brief p. 27). On June 19, 1997, Mr. Brown and Mr. Hawes met Mr. Levin in New York. In that meeting, Mr. Levin told Brown and Hawes that:

> . . . he was angry because Brown's actions had violated the trust that Levin had placed in Brown. (Tr. 680 Levin.) Accordingly, Levin informed Brown that he would be placed on suspension while an investigation was conducted, and that at the end of the investigation, it would be determined whether or not Brown's termination would be for cause. (*Id.*)

On June 20, 1997, when the statement was made, Mr. Levin had no reason to believe Mr. Brown committed any illegal acts. The most Mr. Levin could claim is that Mr. Brown was guilty of a conflict of interest and breach of the confidentiality clause. However, this could not be classified as an illegal act under the circumstances present here. The investigation that Mr. Levin had ordered had just begun on June 19, 1997, and had not yet been completed. (Coleman Brief. P. 29) If Mr. Levin believed it was necessary to explain his reasons for suspending Mr. Brown on June 20, 1997, he could have stated the facts as he viewed them at that time and then reassured everyone that the company was not for sale.

In addition, if a communication is to be considered privileged, it should be made only to those persons who have a need to know. The statement made here was not limited but was made to an assembled group of employees at The Coleman Powermate Division. There is no legitimate excuse for making such a statement to this group. Therefore, we find that Mr. Levin's statements were not made in good faith and were reckless and malicious.

In conclusion, we find: (1) a false and defamatory statement concerning Mr. Brown was made by Mr. Levin; (2) Mr. Levin made this statement to an assembled group of Coleman Powermate employees and it was not privileged; (3) the statement made by Mr. Levin was not just negligent but was in reckless disregard of the truth which constitutes actual malice; and (4) the statement constitutes slander per se.

Under Nebraska law, plaintiffs alleging slander per se are not required to prove damages or special damages because damages are presumed. Hutchens v. Kuker, 168 Neb. 451, 96

N.W. 2d 228 (1959); Hruby v. Kalina, 228 Neb. 713, 716, 424 N.W. 2d 130, 132 (1988). Therefore, after considering the law and the evidence, we award Mr. Brown nominal actual damages of $1.00 and $350,000.00 in punitive damages.

Respondent's Counterclaims

The panel finds against Coleman and in favor of claimant Brown on Coleman's counterclaims and awards Coleman nothing on said counterclaims.

Attorneys' Fees and Expenses

Claimant Brown's attorneys' fees and expenses are awarded in favor of Mr. Brown and against Coleman. The parties may either stipulate to remaining attorneys' fees within fifteen (15) days of the date of the award or Mr. Brown may submit application for fees and expenses within seven (7) days thereafter with Coleman's response due within seven (7) days thereafter.

American Arbitration Association Fees and Expenses

We award the American Arbitration Association administrative fees and expenses in favor of Claimant Brown, which are to be borne by Respondent Coleman.

We award the arbitrators' compensation in favor of Claimant Brown, which is to be borne by Respondent Coleman.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GERALD E. BROWN,	)	
	)	
Plaintiff-Appellant/	)	
Cross-Appellee,	)	
	)	
v.	)	Nos. 99-3181, 99-3203
	)	
THE COLEMAN	)	
COMPANY, INC.,	)	
a Delaware corporation,	)	
	)	
Defendant-Appellee/	)	
Cross-Appellant.	)	

ORDER

Filed September 29, 2000

Before BALDOCK, MAGILL* and LUCERO, Circuit Judges.

* Honorable Frank Magill, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appellee/Cross-Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/Patrick Fischer
Deputy Clerk

Supreme Court, U.S.
FILED
JAN 29 2001
OFFICE OF THE CLERK

(2)

No. 00-1051

IN THE

Supreme Court of the United States

THE COLEMAN COMPANY, INC.,

Petitioner,

v.

GERALD E. BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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Wyandot, Inc. v. Local 227, 205 F.3d 922 (6th Cir. 2000) 8, 10

Rule:

AAA Employment Disputes Rule 34(d) 10

STATEMENT OF THE CASE

It is undisputed that The Coleman Company, Inc. ("Coleman") wrongfully terminated Gerald E. Brown ("Brown"), breaching their employment contract and defaming him in the process. As a result, a three member panel of arbitrators awarded Brown $3,617,930. Approximately $2.3 million of that award was for the value of Brown's stock options which he could have exercised a short time after the wrongful termination. The panel justified this portion of the award on two grounds: (1) an interpretation of the contract, pursuant to which the panel found that Brown had never been properly terminated, for cause or not for cause, and therefore, should have been able to exercise his stock options during a subsequent change in control of the company; and (2) invocation of a principle of equity, whereby Coleman should be prevented from being unjustly enriched by its own wrongful conduct. The District Court for the District of Kansas confirmed two portions of the panel's award to Brown, vacating only the portion relating to Brown's stock options. In vacating the stock options award, the District Court substituted its judgment for that of the arbitrators. The Court of Appeals for the Tenth Circuit reversed the District Court's vacatur of the stock options award, specifically finding that: (1) the arbitration panel had interpreted the contract in constructing its award, and thus, the District Court could not overturn the award even if it disagreed with that interpretation; and (2) under the rules Coleman chose in drafting Brown's employment contract, the arbitrators also had sufficient equitable powers to make the award they had entered.

REASONS FOR DENYING THE WRIT

The writ should be denied because the Tenth Circuit's opinion does not raise the question that petitioner claims is present. Instead, petitioner mischaracterizes the Tenth Circuit's opinion in an attempt to manufacture some reason for this Honorable Court to take up their petition. The Tenth Circuit *did not* hold that the arbitrators could or did "reject the express terms of the governing contract in favor of relief that comports with their own personal sense of justice." Pet. at (i). This language is totally manufactured by the petitioner, is nowhere to be found in the Tenth Circuit's opinion, and does not comport with the Tenth Circuit's express findings.

Further, the question presented by the petitioner challenges only one of two explicit bases for the Tenth Circuit's decision. Thus, even if this Honorable Court should take up the petition and issue a ruling in petitioner's favor, the Tenth Circuit's decision could stand on the alternative ground not challenged herein.

Finally, the Tenth Circuit's opinion does not have a chilling effect on future arbitrations or business arrangements, nor does it conflict with decisions in the Sixth or Third Circuits, as petitioner maintains. The only basis that petitioner asserts for these potential effects is the petitioner's own mischaracterization of the Tenth Circuit's opinion. A plain reading of the Tenth Circuit's opinion demonstrates the fallacy of petitioner's request and confirms that the Tenth Circuit's opinion did not create any conflict of authority. For all of these reasons, the petition should be denied.

I. COLEMAN'S BRIEF MISCHARACTERIZES AND MISSTATES THE TENTH CIRCUIT'S OPINION

Under a heading in its opinion entitled "A. Interpretation of the Contract," Pet., App. A at 5a, the Tenth Circuit correctly held that:

> **The arbitration panel interpreted the contract in making this award** . . . how the district court would have interpreted the contract is not at issue. Because **the $2,322,335 stock options award was based on the contract,** the panel's decision must be confirmed and the district court reversed.

Pet., App. A at 7a. After finding the arbitrators had reviewed and expressly construed the contract at issue, the Tenth Circuit cited an additional, alternative ground for the arbitration award: principles of equity. In a separate section of its opinion, entitled "B. Equity," the Tenth Circuit stated:

> Further, this Court now determines the panel's decision **also** was justified under its powers to provide an equitable remedy.

Id. Each of the two holdings doom Coleman's petition. Coleman's petition, however, is based entirely on the second alternative — the equity holding. Coleman completely ignores the first alternative — the "Interpretation of the Contract" holding. This is a fatal flaw.

A. Coleman Waived Its Right To Review By Not Challenging The Independent Contract Interpretation Ruling.

By not seeking review of the first independent basis for the Tenth Circuit's ruling, interpretation of the contract, Coleman waived any challenge thereto. *Moncrief v. Williston Basin Interstate Pipeline Co.*, 174 F.3d 1150, 1155 (10th Cir. 1999). Thus, even if this Court were to address, for the sake of argument, the "Equity" reasoning challenged by Coleman, the Tenth Circuit's judgment would stand because the stock option damages are wholly supported by the Tenth Circuit's unchallenged "Interpretation of the Contract" holding. For this reason alone, Coleman's petition should be denied.

Second, as demonstrated below, the Tenth Circuit's contract holding completely undermines Coleman's mischaracterization of the Tenth Circuit's opinion and demonstrates the fallacy of the purported "Question Presented" by Coleman. Coleman obviously chose to ignore the explicit language in the Tenth Circuit's ruling, which found the arbitrators were construing the contract, because that language undermines its flawed petition.

B. Coleman's Petition Repeatedly Misstates and Mischaracterizes The Tenth Circuit's Opinion And Possible Effect.

1. Coleman's "Question Presented" Is Erroneous.

Coleman attempts to overturn the Tenth Circuit's opinion by completely misstating what the court held. The primary misstatement by Coleman — that the Tenth Circuit found it was permissible to completely disregard the contract to fashion an equitable remedy — appears first in the "Question Presented" by Coleman. Coleman erroneously told this Court that a legitimate question existed as to:

> Whether the Tenth Circuit erred in holding that a provision in the rules of the American Arbitration Association . . . empowers arbitrators to reject the express terms of the governing contract in favor of relief that comports with their own personal sense of justice . . .[1]

Pet. at (i). As is apparent from the lack of any citations within the petition to any language in the Tenth Circuit's opinion supporting Coleman's fabricated question, the petition is without any legitimate basis. First, the Tenth Circuit never

---

1. Coleman repeats this misstatement throughout its petition. *See, e.g.*, "The court determined [the rule] . . . enabled the arbitrators to reject the express terms of the contract . . .", Pet. at 9; "The Tenth Circuit . . . held that the arbitrators disregard of the contract was justified . . .", Pet. at 2; ". . . to hold that the arbitrators' power to fashion 'just and equitable' relief authorizes them to defy the express provisions of the contract." Pet. at 16. Coleman cites no supporting language in the Tenth Circuit's opinion for these statements; none exists.

held that any rule "empowers arbitrators to reject the express terms of the governing contract . . .". This language is nowhere in the opinion. Nor did the Tenth Circuit ever find the relief granted by the arbitrators was expressly barred by the contract. Instead, the Tenth Circuit explicitly found to the contrary, noting: "The arbitration panel interpreted the contract in making this award." Pet., App. A at 7a. The Tenth Circuit also correctly cited this Court's controlling authority in finding:

> Brown and Coleman contracted for the arbitrator's construction of the contract not a judge's construction. See Enterprise Wheel, 363 U.S. at 599, 80 S.Ct. 1358 (stating "the courts have no business overruling [the arbitrator] because their interpretation of the contract is different from his.")

Pet., App. A at 6a. Further, the Tenth Circuit cited the well-settled law that " 'a court may not overturn an arbitrator's decision even where error has been committed.' *NCR Corp. v. District Lodge No. 70*, 906 F.2d 1499, 1504 (citing *United Paperworkers Int'l Union, AFL-CIO, v. Misco*, 484 U.S. 29, 37-40, S.Ct. 364, 98 L. Ed. 2d 296 (1987))."

In short, Coleman's position is not based on the actual language or holdings of the Tenth Circuit's opinion. Nor could it be, because the Tenth Circuit explicitly followed this Court's prior rulings. *See, e.g.*, Pet., App. A at 5a–6a. Coleman's petition is without merit.

2. Coleman Dramatically Misstates The Effect Of The Tenth Circuit's Opinion On Future Cases.

Again ignoring the plain language of the opinion, Coleman erroneously claims the judgment will have a chilling effect on future arbitrations because "parties cannot control or limit by the express terms of their contracts the remedies that the arbitrators may award. . . ." Pet. at 11; *see also* Pet. at 18. This statement is simply wrong.

The Tenth Circuit squarely addressed this issue when it noted the undisputed fact that:

> Coleman drafted Brown's employment contract, and thus, chose the rules of arbitration that would be used to settle the disputes. Coleman was not bound to choose rules that provided such broad power to the arbitrator to grant equitable relief, however, having chosen the rules of arbitration, Coleman is now bound by those rules.

Pet., App. A at 18a. In other words, Coleman lost the case under the rules Coleman chose. As the sole drafter of the contract, Coleman could have excluded equitable remedies, chosen different rules or created unique, limited and specific remedies. Nothing precluded the parties from choosing different rules or carving out certain remedies, as parties frequently do when contracting. Nor did anything mandate that Coleman choose to utilize the rules of the American Arbitration Association. But having made its choice in the employment contract, Coleman must now accept the consequences. The arbitrators operated under the contract Coleman drafted.

C. Coleman Mischaracterizes the Tenth Circuit's Opinion in an Attempt to Manufacture a Split of Authority.

Petitioner argues that the Tenth Circuit's opinion in this case conflicts with decisions from other circuits, *Wyandot, Inc. v. Local 227*, 205 F.3d 922 (6th Cir. 2000), and *Swift Industries, Inc. v. Botany Industries, Inc.*, 466 F.2d 1125 (3d Cir. 1972). Petitioner's argument is without merit for two reasons. First, the argument is premised on the same mischaracterization that pervades all of its petition — that the Tenth Circuit's opinion authorizes arbitrators to completely disregard the express terms of the contract when creating an award. Pet. at 11. Second, neither *Wyandot* nor *Swift* conflicts with the Tenth Circuit's decision; rather both cases are factually distinguishable from this case presented below.

In *Wyandot*, a discharged employee filed a notice of grievance more than twelve days after the last date on which she could file a notice of grievance under the collective bargaining agreement. 200 F.2d at 925. The arbitrator expressly found that the notice was untimely under the contract, and yet determined that the grievance was arbitrable. *Id.* at 926. In so finding, the arbitrator did not rely on any provisions in the contract or attempt to interpret contract provisions in any way. Rather, the arbitrator relied, without explanation, on a letter from the union indicating that it intended to submit the untimely grievance to arbitration, apparently as providing sufficient notice of the grievance to the company. *Id.* Thus, the arbitrator there lacked authority to even hear the dispute. No such issue was ever raised by Coleman here. Nor was the ruling in *Wyandot* separately supported by an independent contract interpretation ruling, as there is in this case.

Here, by contrast, the panel looked to the express terms of the contract in deciding that Brown's termination was tantamount to "no termination at all," and, therefore, Brown was able to recover the value of the stock options he would have exercised but for Coleman's wrongful conduct. Pet., App. A at 6a. The panel here did not, as petitioner asserts, extend the exercise period beyond one prescribed by the contract after a proper termination. Pet. at 15. Rather, the panel found that Brown was never properly terminated under the contract's termination clauses.

> The arbitration panel found Coleman had failed to properly terminate Brown for cause under paragraph 5(c) of the contract. Further, Coleman did not meet the requirements for terminating Brown without cause under paragraph 5(f) because proper notice was never given as required by paragraph 5(g). . . . Thus, Coleman's actions were "tantamount to no termination at all."

Pet., App. A at 6a. As this quote demonstrates, the arbitrators clearly applied the specific provisions of the contract when formulating their decision, as correctly noted by the Tenth Circuit. Moreover, the panel's alternative, equitable ruling was soundly based in the broad equitable powers given to the panel by the contract drafted by Coleman, specifically AAA Employment Disputes Rule 34(d).

In *Swift*, an agreement between the parties provided that the defendant would pay plaintiff in cash an amount equal to all losses, liabilities and expenses incurred or suffered by plaintiff in the event of a breach of warranty. 466 F.2d at 1127. The agreement also provided that disputes were to be governed by American Arbitration Association Commercial

Arbitration Rules which provided that the arbitrator could grant any remedy he deemed just and equitable *and* within the scope of the agreement between the parties. *Id.* at 1129. Swift demanded arbitration on a claim for breach of warranty triggered by a potential tax liability that was pending before the tax court. *Id.* at 1127-28. The arbitrator's award required Botany to deliver a six million dollar cash bond to Swift to cover any potential tax liability. *Id.* at 1128. That award was vacated, and the Sixth Circuit affirmed, on the basis that the award was beyond the scope of the agreement. *Id.* at 1132-33. The court held that the agreement called for the payment in cash for any existing liability and did not provide for the posting of security for potential liabilities. *Id.*

Again, the Tenth Circuit's ruling here creates no conflict with *Swift*. First, as noted by the Tenth Circuit, it is undisputed that the applicable rule in this case, AAA Employment Disputes Rule 34(d), provided broader equitable powers to the arbitrators than was the case in *Swift*. Second, the award here did not contradict the express terms of the contract as the panel determined that Brown was never properly terminated by Coleman.

Thus, Coleman's attempt to suggest a split among the circuits must fail. Notwithstanding petitioner's numerous mischaracterizations, the Tenth Circuit's opinion is not in conflict with *Swift* and *Wyandot*, which are factually distinguishable and were decided under different rules. Moreover, in rendering its decision, the Tenth Circuit faithfully applied the case-law and principles well-established by authorities issued by this Court. Pet., App. A at 5a-6a.

CONCLUSION

For all of the foregoing reasons, this Honorable Court should deny the petition for writ of certiorari.

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IN THE

Supreme Court of the United States

October Term, 2000

THE COLEMAN COMPANY, INC.,

Petitioner,

v.

GERALD E. BROWN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Hoping to downplay the importance of the Tenth Circuit's unprecedented ruling granting broad equitable powers to arbitrators in contract cases, respondent Brown misrepresents both the decision at issue and petitioner Coleman's arguments. As we show, Brown completely fails in his effort to portray this as a routine case not warranting the Court's attention. In fact, it remains clear that the Tenth Circuit issued a ruling on an

important issue of federal law that not only is glaringly wrong, but conflicts with decisions in at least two other circuits.

To begin with, there can be no doubt that the Tenth Circuit affirmed an arbitration award in which the arbitrators refused to enforce the contract's stock options provisions as written and instead granted an "extension of the terms of the options" because that supposedly was an "equitable solution." Pet. App. 51a. In so doing, the Tenth Circuit "h[e]ld that Rule 34(d) of the AAA Employment Disputes Rules permits the crafting of broad equitable relief, and that the panel did not exceed its power by granting the equitable relief of extending the time in which the stock options could be exercised." Pet. App. 8a. The Tenth Circuit held that the AAA Rules authorize such relief *regardless of the terms of the contract.*

Moreover, it is incorrect for Brown to suggest that Coleman has "waived" any challenge to the alternative, contractual basis of the decision below. To the contrary, as Brown recognizes, the linchpin of Coleman's "equity" argument is the assertion, included within the scope of the question presented, that the relief awarded here *cannot* be justified as based on an interpretation of the contract.

Finally, despite Brown's arguments to the contrary, the ruling below inevitably will affect a large number of AAA arbitrations nationwide, given that four million workers presently are covered by AAA-administered dispute resolution plans. *See* AAA, *Introduction to National Rules for the Resolution of Employment Disputes*, 1998 WL 1527109 (A.A.A. Nov. 20, 1998). The Tenth Circuit's decision also will deter contracting parties from using non-litigation alternatives such as arbitration to resolve their disputes: if procedural rules

such as those adopted by the AAA trump express contractual terms, as the Tenth Circuit has effectively held, then parties will retreat from using arbitration as an alternative to litigation. Consequently, the reasons for granting review are compelling, and Brown's arguments to the contrary do not alter that conclusion.

1. Brown accuses Coleman of "completely misstating what the [Tenth Circuit] held." *See* Resp. Opp. 5. He denies that the Tenth Circuit held that Rule 34(d) of the AAA Employment Disputes Rules empowers arbitrators to reject express contractual terms in favor of "equitable" relief that violates the contract. *See* Resp. Opp. 5-6. In fact, however, it is Brown who is misrepresenting the decision below.

In the portion of its decision entitled "Equity," the Tenth Circuit was operating on the assumption that the relief awarded by the arbitrators could not be justified based on the employment contract. It nevertheless "h[e]ld that Rule 34(d) of the AAA Employment Disputes Rules permits the crafting of broad equitable relief, and that the panel did not exceed its power by granting the equitable relief of *extending* the time in which stock options could be exercised." Pet. App. 8a (emphasis added). In holding that the arbitrators acted properly under Rule 34(d) in "extending" the contract's express provisions, the Tenth Circuit stressed a distinction between the language of Rule 34(d) and the language of Rule 45(a) of the AAA Commercial Arbitration Rules. Regarding Rule 45(a), the Tenth Circuit emphasized that it requires that any equitable relief the arbitrators might award be "*within the scope of the agreement of the parties*." Pet. App. 8a (emphasis in original). The Tenth Circuit then proceeded to reason that "[i]f the emphasized language in Rule 45(a) limits the equitable powers

of the arbitrator in commercial arbitrations to the express language of the contract, . . . *the absence of such language in Rule 34(d) would logically mean that the equitable powers of arbitrators operating under the AAA Employment Disputes Rules are not limited to the same extent as under the AAA Commercial Arbitration Rules*." Pet. App. 8a (emphasis added). In other words, the Tenth Circuit held that when fashioning equitable relief under Rule 34(d), arbitrators are not confined to the "scope of the agreement of the parties." Instead, arbitrators enjoy broad authority to fashion any relief they please — even relief that, as here, contradicts the express terms of the governing contract. Notwithstanding Brown's heated denials, this was the clear and unmistakable holding of the Tenth Circuit.

2. Brown also attempts to avoid review of the Tenth Circuit's unprecedented grant of equitable discretion to arbitrators by stressing that the Tenth Circuit ruled in the alternative that the relief at issue could be seen as emanating from an interpretation of the contract. Brown asserts that Coleman has "waived" any challenge to this alternative holding and thus failed to preserve any basis for seeking outright reversal of the Tenth Circuit. *See* Resp. Opp. 4. That assertion plainly is incorrect. The question presented in the petition is premised on the claim that the arbitrators in this case fashioned equitable relief "that contradicts the essence and terms of the contract." *See* Pet. i. Whether the arbitrators' award does so is a subsidiary question that is part and parcel of the question Coleman has presented for this Court's review. *See* Sup. Ct. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein"). Thus, Coleman's petition asks this Court to grant review and

reverse the Tenth Circuit — not simply to review one of its alternative holdings.[1/]

3. In a further attempt to downplay the impact of the decision below, Brown insists that Coleman "dramatically misstates the effect of the Tenth Circuit's decision on future cases" — apparently because parties may refuse to incorporate the AAA Rules into their contracts. *See* Resp. Opp. 7. That argument sidesteps the present-day reality that arbitration clauses incorporating the AAA Rules already have been incorporated into countless employment contracts. Indeed, as stated above, the AAA recently estimated that some *four million* workers are covered by its dispute resolution plans. *See* AAA, *Introduction to National Rules for the Resolution of Employment Disputes*, 1998 WL 1527109 (A.A.A. Nov. 20, 1998); *see also* Brief of Amicus Curiae American Arbitration

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1/ Respondent does not even attempt to defend on the merits the Tenth Circuit's holding that the arbitrators' award constitutes a permissible interpretation of the contract. The Tenth Circuit concluded that the arbitrators' $2.3 million stock options award was justified because the "arbitration panel found Coleman had failed to properly terminate Brown for cause under paragraph 5(c) of the contract" and "did not meet the requirements for terminating Brown without cause under paragraph 5(f)" since "proper notice was never given as required by paragraph 5(g)." Pet. App. 6a. In reaching this conclusion, the Tenth Circuit overlooked that the adequacy of the termination notice was raised by Brown for the first time on appeal and was never addressed by the arbitrators. Indeed, the arbitrators' award does not even mention any of the three contractual provisions cited by the Tenth Circuit — much less find that Coleman failed to comply with their requirements. Thus, there is absolutely no basis for the Tenth Circuit's conclusion that the arbitrators interpreted the terms of the contract in rendering their award.

Ass'n in No. 99-1379, 2000 WL 1132767 (Aug. 7, 2000), *Circuit City Stores, Inc. v. Adams*, at 1 ("Millions of non-union U.S. workers currently are covered by mediation and arbitration agreements that call for administration by the AAA"). Thus, regardless of the *future* ability of parties to avoid AAA Rules, the *present* reality is that they govern millions and millions of employment agreements. Brown ignores this point.

Brown also ignores that AAA Rules often govern the conduct of arbitrations even when parties have not incorporated those Rules into their contracts. *See* Carol L. Izumi, *et al., Proceedings of 1997 Annual Meeting of the Association of American Law Schools Sections on Employment Discrimination Law and Alternative Dispute Resolution*, 1 Employee Rts. & Employment Pol'y J., 269, 282 (1997) (remarks of Marion Zinman of AAA). Thus, even parties that have refused to incorporate the AAA Rules into their contracts may find their arbitrations governed by those Rules.

4. Brown ends by advancing a number of purported distinctions between the facts of this case and the facts of *Wyandot, Inc. v. Local 227, United Food & Commercial Workers Union*, 205 F.3d 922 (6th Cir.), *cert. denied*, 121 S. Ct. 62 (2000), and *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125 (3d Cir. 1972) — in an effort to show that there is no inter-circuit split warranting review. In the process of doing so, however, Brown misrepresents the pertinent circumstances of this case. For example, Brown states that the arbitration "panel looked to the express terms of the contract in deciding that Brown's termination was tantamount to 'no termination at all.'" *See* Resp. Opp. 9. In fact, this Court will search the arbitration award in vain for any hint that the panel "looked to the express terms of the contract in deciding that Brown's termination" did

not comply with the contract's requirements. It is not there. Indeed, the three contractual provisions cited by Brown and the Tenth Circuit for the proposition that "the panel found that Brown was never properly terminated under the contract's termination clauses" (Resp. Opp. 9; Pet. App. 6a) — paragraph 5(c), paragraph 5(f), and paragraph 5(g) — *are not cited, let alone interpreted or applied, in the arbitration award.* Brown's contention in the face of this fact that "the arbitrators clearly applied the specific provisions of the contract when formulating their decision" (Resp. Opp. 9) is, to say the least, disingenuous.

What the arbitrators actually did, contrary to the account advanced by Brown, was "grant an extension of the terms of the options" provided in the contract because the arbitrators "believe[d] that to be an equitable solution." Pet. App. 51a. By affirming this result on the ground that the AAA Rules afforded the arbitrators' broad equitable authority, the Tenth Circuit reached a result that conflicts with the decisions of the Sixth Circuit in *Wyandot* and the Third Circuit in *Swift*, both of which hold that arbitrators cannot fashion "equitable relief" that contradicts the terms of the parties' contract. *See Wyandot*, 205 F.3d at 930; *Swift*, 466 F.2d at 1133-34. The differences in the holdings of the Tenth Circuit in this case, and of the Sixth and Third Circuits in *Wyandot* and *Swift*, cannot be explained away by making fine distinctions in their facts; these reported decisions present this Court with a direct and irreconcilable circuit split that warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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